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The Influence of the Principle of Integration in the Promoting Integrated Permitting – A Critical Reflection Through the Lens of Netherland´s Integrated Permitting Regime

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Abstract

Integrated permitting becomes an increasingly more important instrument in environmental governance. Addressed by the challenges of fragmented or contradictory decisions in environmental governance, states gained the insight that permitting based on "media-division" is not the most effective approach to realise high environmental standards. Consequently many states have developed or plan to develop integrated permitting regimes. The international growth in integrated permitting regimes raises the question what are components of successful integrated permitting regimes and how are they theoretically underpinned? This thesis distils key factors of permitting regimes by reviewing the normal administrative procedure for permitting. It critically evaluates how the integration principle is capable to promote integrated permitting in the field of environmental governance. Permitting can be integrated on different levels, but total integration is only given if one permit is granted by one single authority after the conduction of a single administrative procedure under a comprehensive holistic framework. This thesis critically examines whether integrated permitting primarily have to be associated with a fully integrated framework; therefore it consults other, with permitting linked, factors, such as coordination and co-operation between the different departments.

The notion of integrated permitting is underpinned by various constructs. Sustainable development, the buzz word of modern environmental governance, especially relies on the integration principle. Additional concepts, such as cooperative environmental governance, integrated environmental governance, holistic governance and environmental policy integration are other notions strongly linked to both sustainable development and the integration principle. Hereby, various forms of fragmentation threat the overarching goal of environmental protection, which the different notions all seek to implement and to promote. Also the Netherlands experienced a fragmented environmental law regime based on sectoral and fragmented acts; both environmental authorisation and the whole environmental governance followed a media-based approach. This thesis explores in detail how the Netherlands have progressively realised highly integrated permitting schemes being singular in the European Union. The Dutch experiences are assessed as a possible way forward to promote integrated permitting in other jurisdictions, as well. Thus some lessons can be learnt from the Dutch environmental governance, which implements integrated permitting exemplary in many ways.

Table of Contents

List of Abbreviations

BREF	Best Available Techniques Reference Document
EC	European Community
ECJ	European Court of Justice
EECCA	Countries of Eastern Europe, Caucasus and Central Asia
EMA	Dutch Environmental Management Act
EPI	Environmental policy integration
EU	European Union
IPPC	Integrated pollution control and prevention
OECD	Organization for Economic Co-operation and Development
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNEP	United Nations Environment Programme
WABO	Dutch Environmental Licensing (General Provisions) Act (dutch acronym for Wet algemene bepalingen omgevingsrecht)

1. Introduction

1.1 Content and Scope

In 1987, the former Canadian federal minister of the environment asked: "How long can we go and safely pretend that the environment is not the economy, is not health, is not the prerequisite to development, is not recreation?"[1] Hereby, he addressed the topic of integration in environmental policy – a term which had not been coined yet, in those days. Since these days it has increasingly been recognized that environmental policy is not to be strictly divided from other parts of law, but has to be applied holistically in all areas impacting the environment.[2] Because the ecological system with its environmental media is interrelated in multiple ways, the protection of the environment cannot be achieved by the regulation of the individual media. Instead it has become apparent that the single media approach leads to fragmented environmental governance systems and inefficiencies.[3] In contrast to the ideal of integrated and holistic policies and frameworks, fragmentation in different forms is often reality. To mitigate fragmentation, the states seek to promote holistic und comprehensive protection of the environment by implementing institutional and legislative integration.[4] Hereby the term integration is used as an umbrella term; in the broad sense it concerns the protection of the environment in every decision potentially related to environmental impacts and considers the environment as an interconnected unit.[5]

The starting point for promoting integration is principle 13 of the 1972 *Stockholm Declaration*, which obliges the member states to adopt an integrated and coordinated approach to their development planning to ensure that development is compatible with the need to protect and to improve the environment for the benefit of the population.[6] In 1987, the World Commission on Environment and Development further elaborated the link between economy and development.[7] Its final report, "Our Common Future" shaped the understanding of the term sustainable development and emphasized that the notion includes environmental, economic and social aspects. The

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[1] Charles Caccia, the former Canadian federal minister of the environment, at a public hearing organized by the World Commission on Environment and Development in May 1986, WCED 1987: 38.
[2] Veinla 2008 *Juridica International* XV 5.
[3] See chapter 2.3.
[4] OECD *Guidelines* 15.
[5] Commoner's first law of ecology is: "Everything is Connected to Everything Else" *The Closing Circle* (1971) 16.
[6] Declaration of the United Nations Conference on the Human Environment UN Doc A/Conf.48/14/Rev 1(1973); 11 ILM 1416 (1972).
[7] Established by the General Assembly "Process of preparation of the Environmental Perspective to the Year 2000 and Beyond" 1983.

integration principle is highlighted as the basis that sustainable development relies on.[8] The evolution of the concept finally resulted in the 1992 *Rio Declaration*, with its fourth principle stating that environmental protection shall constitute an *integral* part of the development process in order to achieve sustainable development and hence cannot be considered in isolation from it.[9] The *Rio Declaration* marks a cornerstone in the development because it confers the principle of integration a legal status in international environmental law.[10]

Accordingly, the integration principle has been receiving pervasive political and legal backing, especially within the framework of the European Union. The founding treaties of the European Union assigned it to a written principle;[11] the European Court of Justice later confirmed its legal character in the case *Greece v Council*.[12] Recently, integration was further strengthened in the European framework; the so called Cardiff Process, which is concerned with programmatic planning, took integration in Europe to the highest level of politics.[13] Also at the international level, the recognition of the integration principle is reflected by the politics of different organizations. In the process following the *Brundtland Report*, the United Nations Conference on Environment and Development (UNCED) strongly promoted integration.[14] The Organization for Economic Co-operation and Development (OECD) has been especially stressing the importance of integration to achieve sustainable development.[15] Recently, in 2002, the International Law Association recognized "the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives" as a principle.[16] Thus, international organisations consistently promote integration in environmental protection.

The resemblance of the integration principle to other key principles concerned with environmental governance leads to the question of how these concepts relate to each others, namely: sustainable development; integrated environmental management; environmental policy integration and cooperative governance. All these concepts play important roles in modern

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[8] Report of the World Commission on Environment and Development: Our Common Future Annex to UN Doc A/42/427(1987) ("*Brundtland Report*") ch 2 sec 72.
[9] United Nations Conference on Environment and Development (UNCED) Rio Declaration on Environment and Development UN Doc A/CONF.151/26 (vol. I); 31 ILM 874 (1992) Principle 4.
[10] Lafferty & Hovden 2003 *Environmental Politics* 4.
[11] Treaty on European Union and of the treaty establishing the European Union ("Maastricht Treaty") 31 ILM 247 Art. 6.
[12] *Greece v Council* 62/88 29 March 1990.
[13] European Commission *Environment Integration* http://ec.europa.eu/environment/integration/integration.htm.
[14] Lafferty & Hovden 2003 *Environmental Politics* 4.
[15] Lafferty & Hovden 2003 *Environmental Politics* 4.
[16] The 70th Conference of the International Law Association (ILA) *New Delhi Declaration of Principles of International Law Relating to Sustainable Development* 02.04.2002 para 7.1–7.3.

environmental governance and are related to the integration principle. The *Brundtland Report* defines the term *sustainable development* as "development which meets the needs of the present generations without comprising the ability of future generations to meet their own needs".[17] It points to economic, social and cultural aspects which have to be integrated in decisions about economic development. Nevertheless its "core normative content"[18] remains indefinite; that is why it is described by way of elements characterizing it. Integration plays a most important role in providing some definition.[19] *Environmental policy integration* is often used as a synonym for environmental integration in other policy fields with the aim of implementing sustainable development.[20] Other authors refer to it as external integration mostly at the national level.[21] In that context it is concerned with the integration of environmental topics into other policies. *Cooperative governance* focuses on another aspect; it promotes the coordination of governmental efforts on national, international and intra-national level.[22] Therefore, *cooperative governance* points to internal integration, which is especially concerned with the alignment of governance on the operational level.[23] *Integrated environmental governance*, or *integrated environmental management*, is another concept which aims at promoting sustainable development; it considers the interrelationship between the environmental media and aims to coordinate the different responsible governmental institutions and spheres of government by using a tool of both private and governmental instruments and skills. This thesis, in particular, is concerned with defining and unpacking the content of the integration principle and its relationship with these other environmental governance concepts because it has become one of the most important driving forces in the development of environmental governance in our time. At the same time its content is still quite indefinite and ambiguous.

The increasing recognition of the integration principle influenced environmental governance on multiple levels, nationally and internationally.[24] Thus, the integration principle is practically reflected in the domestic legal frameworks. On the constitutional level, some states have introduced the idea of the integration principle.[25] Institutionally, integration demands the co-

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[17] *Brundtland Report* 8.
[18] Field 2006 *SALJ* 409.
[19] Feris 2010 *PER/PELJ* (13) 1.
[20] Lafferty & Hovden 2003 *Environmental Politics* 6.
[21] Biermann (et al) 2009 *Int Environ Agreements* 354.
[22] Nel & Du Plessis 2001 *SAJELP* 8.
[23] Nel et al *Strategies to integrate* 7.
[24] In 1972, the United Nations Environment Programme (UNEP) was established to promote policy integration in the United Nations (UN).
[25] For example, Art 117 para 2 *The Constitution of the Republic of Mozambique* (2004) Government Bulletin No 12 Maputo; compare also with the obligation of the European countries *Consolidated version of the*

ordination of all policy sectors and levels and leads to the establishment of departmental units for the environment, which advocate environmental issues.[26] Environmental competencies are assigned to single ministries instead of having sectoral ministries dealing with environmental issues.[27] At the statutory level, integration is reflected in *substantive* and *procedural* rules.[28] *Administrative procedures* have to assess impacts on the environment holistically; thus, for example, the hearing of other departments and the public is important to ensure that all environmental and other concerns are considered in the decision making process.

Regulatory instruments in environmental governance also reflect the principle of integration; one crucial outcome is the notion of integrated permitting schemes. Permitting concretizes legal obligations to pre-established norms and compels the permit holder either to obey or to abandon the activity; often it obliges the addressee to comply with certain requirements over the time of the validity of the permit.[29] Then integrated permitting requires that environmental impacts of the planned activity are considered holistically in the application process and the permitting procedure; it also influences the content of the permit which has to ensure the protection of the environment as a unit.[30] Therefore a holistic multimedia permit avoids shifting pollution from one medium to another; additionally, cross-cutting issues can be handled effectively because the environment as a unit is regulated instead of single environmental media. Furthermore, there are advantages for the investors; less bureaucracy and disburdens in terms of time and administrative effort provides incentives to invest.

Theoretically, a whole toolbox of environmental governance instruments promotes the practical realisation of the integration principle in domestic law frameworks. While especially market based instruments increasingly gain acceptance, nowadays classical regulatory instruments, such as permitting, still play an important role.[31] Regarding the implementation of the integration principle, it is assumed that regulatory mechanisms make integration likely more possible in comparison to other instruments.[32] Permitting regimes are one of the most important regulatory instruments. They exist in almost every legal system since permitting regulates many activities and the access to, and the protection of, natural resources. Furthermore, permits are strong regulatory

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treaty on European Union and consolidated version of the Treaty establishing the European Community Art 6 ("*Amsterdam Treaty*") 37 ILM 67 1997.

[26] Jordan & Lenschow 2010 *Env Pol Gov* 153; Jacob & Volkery 2010 *JCPA* 297.

[27] Mueller "Environmental Policy Integration" in *Environmental Policy Integration* 65.

[28] See chapter 2.5.2.

[29] Shelton & Kiss *Handbook* 36-37.

[30] OECD *Guidelines* 13.

[31] Niessen *Environmental Law* 106.

[32] Eg tradable permits: Niessen *Environmental Law* 106.

instruments because non-compliance with the imposed requirements can be enforced by sanctions, including the withdrawal of the permits.[33] Against the background that permitting regimes are more tangible and contemporary, this dissertation is in particular concerned with integrated permitting regimes.

1.2 Rationale and Purpose

The importance of integrating environmental issues in other policies is widely recognized; seen by the growing toolbox of instruments implementing a coherent and holistic approach to managing the environment. Indeed domestic legal frameworks also reflect the trend by introducing the principle in their legislation and by implementing environmental governance instruments to give effect to integration. But it is notable that most permitting regimes continue to use single media permits granted by the respective responsible administrative unit within its limited competence.[34] In practice, approval clauses and procedures are often based on a fragmented legal basis: several legal frameworks require different permits. The approach of granting single media permits contradicts the integration principle which indicates integrated permitting. Recognizing that environmental media form an integrated, highly interdependent system, it seems inefficient to regulate single media - especially because it has to be avoided that negative environmental impacts, such as pollution, are shifted from one media to another. In the light of these discrepancies, this dissertation focuses on integrated permitting regimes.

Taking into account the necessity of coherent and holistic environmental governance, this dissertation examines the role of the integration principle in promoting integrated permitting. The main legal research question is how the integration principle is capable of promoting improved integrated permitting regimes. Therefore the different dimensions of integration have to be unpacked in order to assess how they affect the design of permitting regimes. For the purpose of analysis, the key theoretical components of successful integrated regimes are unpacked. Therefore the *OECD Guidelines for integrated environmental permitting*[35] are used.

Many states have been experimenting with introducing comprehensive integrated permitting regimes.[36] One example of good practice is the Netherlands. Using the above mentioned key theoretical components of successful integrated permitting regimes, the Dutch environmental

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[33] Bray "*Administrative Justice"* in *Environmental Compliance and Enforcement* 186.
[34] See EEA *Technical report* No 2/2005.
[35] OECD *Guidelines*.
[36] Eg Sweden, Denmark, the Netherlands and The United Kingdom; compare with chapter 3.1.

permitting regime is analysed with a view to showing how integrated permitting schemes can be constructed and what design elements are key to their success or failure. The Netherlands was, as the first member state in the European Union to successfully introduce integrated permitting in the field of environmental law.[37] This system serves as an example through which to formulate some general lessons. Indeed, the Netherlands environmental permitting regime has been subject to numerous assessments in literature.[38] But with the granting of the 2010 Environmental Licensing (General Provisions) Act,[39] the framework has been further developed in order to improve integrated permitting; thus the situation has changed in contrast to these earlier discussions and provides for this dissertation to assess the practical implementation of integrated environmental permitting in practice.

1.3 Structure

Four main chapters form this dissertation; thus it is structured as follows: After the introduction, chapters two and three provide the theoretical background for the later discussion of the Netherland´s permitting regime. Chapter two proceeds to unpack the nature of the integration principle. Starting point is the assessment of the content of integration; thereafter it is used in different contexts which are elaborated. These contexts are linked to its international development; accordingly the use of the term is reviewed over the course of time. For the purpose of obtaining a complete picture of integration as a *principle* in international environmental law, its legal nature is discussed and analysed. Since the states seek practical advantages from implementing integration; these goals of integration are also discussed. Hereafter, fragmentation as the main threat to coherent and integrated permitting is presented and it is assessed how fragmentation threatens integrated permitting. Then the different dimensions of integration are unpacked; broadly, external and internal integration are distinguished. The latter is elaborated upon through the subcategories of substantive, procedural and organizational integration. Since the move to integrated permitting is significantly underpinned by several key theoretical constructs, hereafter the thesis examines these important environmental governance concepts and how they prevent fragmentation and aim at implementing integration in the policy level. Especially sustainable development is highlighted as the ultimate goal of environmental policies. Among others, also integrated pollution control and prevention is discussed because it presents a typical concept to implement integration.

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[37] Tolsma 2010 *Elni Review* 87.
[38] For example Kotzé 2007 *Comp & Int'l LJS Afr* and Kotzé *A legal Framework*, who excludes all developments after April 2005 from his thesis.
[39] Wet algemene bepalingen omgevingsrecht (dutch acronym: Wabo).

On that basis the focus shifts to integrated permitting; chapter three explores in detail integrated permitting as an instrument to realize integration in practice. It broadly presents how integrated permitting has internationally received growing recognition. Hereafter, the essential question arises which are the key elements of an integrated permitting regimes? In that context mainly the *OECD Guidelines* are used to identify and to critically evaluate the key theoretical elements for a successful integration of permitting regimes.[40] How integration is optimally implemented in the procedure of permitting is comprehensively discussed. Three main factors are highlighted; these are the responsible authority, the holistic multimedia permit and the holistic environmental framework. Furthermore, the application process and the permitting procedures are assessed, as well as the follow-up procedures and legal remedies. Hereafter, variations to the traditional permitting scheme are mentioned and their potential regarding integrated environmental governance. Drawing from the findings, finally the thesis gives general recommendations of how to implement integrated permitting in already existing legal systems.

In the light of the previous findings, chapter four reviews the Dutch permitting regime according the elaborated criteria. In order to provide background information the development of environmental governance in the Netherlands is briefly described. It is analysed to what extent the relevant legal frameworks recognize integrated permitting and which elements of the above presented integrated permitting schemes are used. Drawing from the practical experiences of the country, general lessons about integrated environmental permitting are formulated.

Chapter five evaluates which theoretical factors are particularly important for promoting integrated permitting and critically assesses how they eventually contradict other aims of environmental governance, such as public participation. Finally it contains the conclusion regarding the role of integration in promoting integrated environmental permitting schemes. Drawing from the dissertation, the most relevant findings are summarised to conclude how states and other international bodies are able to learn from the Netherlands integrated permitting regime.

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[40] See n 35.

2. The Nature, Form, Purpose and Dimensions of the Principle of Integration

2.1 The Principles Content

Integration is used in different contexts in international and national environmental law; therefore the content of integration and its role remain quite ambivalent. In the following the term is unpacked and linked to other terms used in that context, such as *harmonization*, *coordination* and *codification*. Starting point presents the *Brundtland Report*. This early international agreement involved at the first view environmentally neutral policies, such as taxation, in the protection of the environment.[41] Following that approach, environmental policy is not to be strictly divided from other parts of law, but has to be applied horizontally in all areas impacting the environment.[42] More precisely, different dimensions of integration have to be distinguished; the concepts of horizontal and vertical integration and internal and external integration are used. European environmental law in particular distinguishes between internal and external integration; internal integration refers to environmental governance which considers the environment as a unit and which follows a cross media approach. How institutions are capable of giving effect integrating environmental issues into other policies, such as economy, is the main focus of external integration. Therefore it is linked to the concept of sustainable development which seeks to achieve the integration of environmental protection into the development process. The differentiation between internal and external integration reflects the different dimensions of integration and is elaborated below. Integration is the main instrument to address institutional, legislative and other fragmentation which is also separately discussed.[43] Other concepts, such as integrated environmental management, environmental policy integration and cooperative governance emerge in the context of environmental governance as well, and are addressed hereafter.

The notions of *harmonization*, *coordination* and *codification* are also used in the context of integration. Harmonization has different meanings. It either points to the act of bringing different legal frameworks together in one piece of legislation or at least coordinate them.[44] Its other meaning refers to the approximation of laws between different legal systems, such as the European Union and its member states.[45] Regarding harmonization, one can distinguish between

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[41] Winter "A Fundament and Two Pillars" in *Sustainable Development* 24 33.
[42] Veinla 2008 *Juridica International* 5.
[43] Fragmentation is discussed in chapter 2.4.
[44] Faure 2000 *Eur Envtl L Rev* 174.
[45] Faure 2000 *Eur Envtl L Rev* 174.

the degree of harmonization and accordingly substantial and procedural harmonization. Substantially, harmonization of environmental law points to the identification of general notions in sectoral law in order to bring them later together in a single environmental framework and in order to implement integrated decision-making.[46] Formally, harmonization refers to the alignment and the concentration of both procedures and licences required for an installation or an activity.[47] Less harmonization is achieved when different legal acts are implemented if they, at least, use the same tools and enforcement mechanism.[48] In contrast, *codification* means the implementation of a single codification containing all environmental frameworks. In theory codification provides the highest degree of harmonization.[49] Nevertheless its actual value depends on the legal situation before. Given a perfectly integrated system existed earlier and was based on different laws, it seems questionable and depends on the circumstances whether the formal act of adopting a universal codification brings about an improvement regarding the degree of harmonization or only the restatement of former frameworks.[50] In case the legislator does not fully harmonize procedures and systems, *coordination* becomes important; in that case *coordination* presents a compromise between total harmonization and fragmented, uncoordinated legislation.[51] The legislator implements coordinative measures when he is faced with sectoral environmental law and different administrative procedures, for example if different licensing systems have to be applied.[52] Regarding all forms of harmonization and coordination, the distinction between content and form is important; a formally perfect harmonized system does not automatically bring about substantial harmonization. Comparing the formal harmonization of decision-making and of environmental policies, the similarity to internal integration becomes apparent. Internal integration in its narrower sense has the same concerns; thus the terms are often used as synonyms.[53]

In sum, integration in environmental law means different things and points to different aspects; it is used as the umbrella term which deals with the interrelatedness in environmental law.[54] Integration - in the widest sense - can be understood as the need to consider environmental protection in every decision potentially related to environmental impacts.[55] Moreover, it describes

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[46] Faure 2000 *Eur Envtl L Rev* 176, 179.
[47] Faure 2000 *Eur Envtl L Rev* 176, 179.
[48] Faure 2000 *Eur Envtl L Rev* 176.
[49] Faure 2000 *Eur Envtl L Rev* 176.
[50] In contrast, Rehbinder points to the ecological value of a codification regarding compliance and as an expression of the political will*, 1995 International Conference in Ghent* 159.
[51] Faure 2000 *Eur Envtl L Rev* 176.
[52] Faure 2000 *Eur Envtl L Rev* 176.
[53] See chapter 2.5.2.
[54] Blomberg et al 2009 *Utrecht L Rev* 133.
[55] Compare with the definition given by Britannica Online, Academic Edition.

the need to take all possible environmental effects into account when planning both legislation and individual activities.[56] It intends the holistic and comprehensive protection of the environment. All parts of the governance make their policies in consideration of the impacts on the environment and recognize the environment as a unit. In contrast to fragmented protection in environmental law, integration seeks a cross media approach and aims to avoid shifting of the pollution from one media to another. It recognizes the interrelatedness of the different parts of environmental law and the need to attune them in law and in practice; integration can take place in acts, plans or permits.[57] Various concepts exist which promote the different dimensions of integration. Integration in the context of sustainable development refers to external integration;[58] it points to the implementation of environmental issues into other policies.[59] In that context integration has been called the backbone of *sustainable development* and represents a distinguished factor concerning its implementation.[60] Furthermore integration is strongly related to other concepts; they are discussed below.[61]

2.2 The Origins and Development of the Principle

The term integration itself has been used in international environmental law for a long time and is reflected by the acknowledgement of the need to approach environmental issues in an integrated way.[62] The starting point for the international trend of promoting integration is Principle 13 of the 1972 *Stockholm Declaration*, which firstly used the term integration. It provides for the member states to "adopt an *integrated* and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population". Principle 13 in particular highlights the need to integrate environmental issues into planning of the countries development. The conference recognized the need to holistically protect the earth's environment; for promoting that, the establishment of the *United Nations Environment Programme* (UNEP) was decided. In 1987, the World Commission on Environment and Development in particular focussed on the link between environment and development reporting under the title "*Our Common Future"*; the so called *Brundtland Report* marked the moment sustainable development became an important policy objective of international

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[56] Veinla 2008 *Juridica International* 5.
[57] Blomberg et al 2009 *Utrecht L Rev* 133.
[58] See for distinction between external and internal integration chapter 2.5.
[59] Faure 2000 *Eur Envtl L Rev* 178.
[60] French *Sustainable Development* 54 quoting from Paper No 3: *Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development 1995.*
[61] See chapter 2.6.
[62] Silveira 1995 *Willamette L Rev* 244.

environmental law.[63] It defines sustainable development as including environmental, economic and social dimensions;[64] therefore it highlights that the concept relies on an integrationist principle.[65]

Comparing the development of the *Brundtland Report* and its following process with later international documents as the *Rio Declaration*[66] and the *Agenda 21*[67] the former seems to narrow down the concept of integration to how issues regarding the environment have to be recognised in *economic* decisions.[68] In Rio, this approach shifts to a broader view on integration including other sectors than economics as well.[69] The 1992 *Rio Declaration*, based on the *Stockholm Declaration*, recognized the concept of sustainable development and therefore highlighted integration. Principle four of the *Rio Declaration* states that "environmental protection shall constitute an *integral* part of the development process in order to achieve sustainable development and cannot be considered in isolation from it".[70] This declaration gives the principle a legal status in international environmental law; thus it marks a cornerstone in the development of integration as a principle regarding both its legal character and its field of application. A further outcome of the "Earth Summit" in Rio was the *Agenda 21*, which is a voluntary action plan the countries produced. The agenda is especially concerned with the participation of all policy sectors to achieve sustainable development "cross-sectoral" by stating: "integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs, improving living standards for all, better protected ecosystems and a safer, more prosperous future".[71] Agenda 21 highlights, in chapters 38 and 39, the need of the nations to cooperate together for achieving protection of inter-regional and global environmental threats.[72] Furthermore, it commits the states facing internal environmental problems to improve their environmental governance.[73] Both the *Rio Declaration* and the *Agenda 21* are not legally binding, but they remain important sources because they define sustainable development with special regards to the integration of environment and development.[74] They consequently enhance the development of sustainability started with the *Brundtland Report*.[75] Recently, in the

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63 Voigt *Sustainable Development* 15.
64 *Stockholm Declaration* Principle 13.
65 Biermann et al 2009 *Int Environ Agreements* 353.
66 See n 8.
67 United Nations Conference on Environment and Development (UNCED) Agenda 21: Programme of Action for Sustainable Development UN GAOR, 46th Sess Agenda Item 21 UN Doc A/Conf.151/26 (1992).
68 Lafferty & Hovden 2003 *Environmental Politics* 4.
69 Rio Declaration Principle 4; Lafferty & Hovden 2003 *Environmental Politics* 4.
70 Rio Declaration Principle 4.
71 *Agenda 21* above note 2, preamble, para 1.1.
72 *Agenda 21* chapter 37, 38.
73 *Agenda 21* chapter 8, 37.
74 Silveira 1995 *Willamette L Rev* 241.
75 Silveira 1995 *Willamette L Rev* 243.

Johannesburg Declaration on Sustainable Development[76], the states confirmed the importance of environmental governance at both the different national governmental levels and internationally.[77]

In 2002, the International Law Association further continued the development of the term and created the *principle of integration and interrelationship* in "*The New Delhi Declaration of Principles International Law Relating to Sustainable Development*".[78] Obviously, it highlights the interdependency of with the environment related policies and sustainable development and evaluates integration as the principle bringing them together; furthermore the declaration emphasises the principle of intergenerational equity by mentioning later generations.

Regarding the European Union, the earliest approach to an environmental policy built more comprehensively is the first *Environmental Action Plan*, adopted in 1973.[79] Lafferty sees it as the basis for environmental policy integration, from which the development to today's importance started, followed by further action plans pushing integration.[80] Later the 1993 *Maastricht Treaty* more generally formulates that environmental considerations must be integrated into other policies;[81] here the use of the imperative shows the emphasis of the request and the fact that the need for integration is out of the question. Four years later, in the *Amsterdam Treaty*, integration was included under its own article six underlying the importance of the principle.[82] In our time integration seems to have reached the role of a written principle in European Law because article six of the EC Treaty states: "Environmental protection requirements must be *integrated* into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development."[83] Here it is pointed to the link between sustainable development – a well-established principle of Environmental Law – and the concept of integration. The legal character of the integration principle in Europe was confirmed in

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[76] United Nations World Summit on Sustainable Development *Johannesburg Declaration on Sustainable Development* UN Doc A/Conf. 199/2 (2002).

[77] Robinson 2002-2003 27 *Wm & Mary Envtl L & Pol'y Rev* 323.

[78] *New Delhi Declaration* para 7.1–7.3: ''[the] principle of integration reflects the interdependence of social, economic, financial, environmental, and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind''.

[79] European Union "First Environmental Action Plan" 1973 states:"The environment cannot be considered as external surroundings by which man is harassed and assailed; it must be considered an essential factor in the organisation and promotion of human progress. It is therefore necessary to evaluate the effects on the quality of life and on the natural environment of any measure that is adopted or contemplated at national or Community level and which is liable to affect these factors".

[80] Lafferty & Hovden 2003 *Environmental Politics* 3.

[81] *Maastricht Treaty* Art 130r para 2.

[82] Lafferty & Hovden 2003 *Environmental Politics* 3.

[83] European Union-consolidated versions of the Treaty on European Union and of the Treaty establishing the European Community (consolidated versions) OJ C 326 2012.

the case Greece v Council;[84] in its judgement, the European Court of Justice (ECJ) highlighted the obligation of the member states to integrate environmental questions into other politics. Recently the development has been shifting more to the practical implementation of integration resulting into to the so-called 'Cardiff Process', named after the decision of the meeting of the European Council in Cardiff in June 1998. There the heads of European state governments discussed the implementation of article six of the Treaty establishing the European Community and decided how to practically enforce integration of environmental issues into other policies.[85] The *Cardiff Process* takes integration in Europe to the highest level of politics and thus strengthens it role.[86] Regarding future development, the "Proposal for a new Environmental Action Program until 2020" was launched, which states that "integration of environmental concerns into other policies must be deepened".[87]

Thus in both legal systems, the UNCED and the European Union, integration has been developed since the 1970s or 1980s and was strengthened regarding its application and its legal character. Integration has become the role of a "key principle of the environment and development discourse",[88] whereat the EU always has been a driving force.[89]

2.3 The Legal Nature of the Principle

Indeed the importance of integrating environmental issues in other policies is highlighted, yet at the same time the legal nature remains unclear. It nevertheless appears necessary to clarify the states obligation to act in compliance with the integration principle; hence its status between a political objective and a principle of international environmental law is discussed. On the one hand integration could be understood as a policy objective, on the other hand as a principle.[90] In favour of integration as an objective in international environmental law is that all actors could agree upon it since it is the lowest common denominator. Consulting the political aim of integration international

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[84] Veinla 2008 *Juridica International* 5.
[85] Lafferty & Hovden 2003 *Environmental Politics* 4; European Commission *Environment Integration* http://ec.europa.eu/environment/integration/integration.htm.
[86] European Commission *Environment Integration* http://ec.europa.eu/environment/integration/integration.htm.
[87] European Commission *Environment Integration Proposal Towards a seventh EU Environment Action Programme* http://ec.europa.eu/environment/newprg/results.htm.
[88] Lafferty & Hovden 2003 *Environmental Politics* 4.
[89] Lafferty & Hovden 2003 *Environmental Politics* 3.
[90] Noellkaemper "Three Conceptions" in *Environmental Policy Integration* 26-29 who also discuss the role of integration as a rule of reference. A rule of reference is not legally binding by itself but obliges the addressee of a legal rule to also comply with certain policies, for example the protection of the environment. But it remains unclear how legally non-binding commitments can become binding obligations by mentioning them in first sources.

agreements and soft law documents would be interpreted in the light of it. The disadvantage of this interpretation is that in legal terms politics are weak; courts and other institutions mandated to interpret activities related to the environment are not bound to measure the contested act according to its value regarding the integration of environmental issues. Hence the last opinion directly values integration as a binding principle in international environmental law. From that, the legal nature still remains indefinite. As so far, different factors have to be considered, mainly the sources of the principle and the used legal language to decide upon the legal nature of a principle.[91] Regarding integration, different opinions about its nature are presented.

According to Sands, integration of environmental protection and development primarily presents one element among four defining sustainable development; he comes to the conclusion that these four elements relate closely together. [92] Because of the connectivity of the single elements the concept of integration does not yet have a legal status or agreed upon definition.[93] A strong argument against that is the common, and from sustainable development independent, use of the integration principle in international agreements and soft law documents. From that, it is convincing to conclude that integration of environmental protection into all fields of policy has become a legal principle in the field of environmental law.[94] Against that, Noellkaemper argues that the emergence of the term in numerous treaties does not show the existence of a general principle of law.[95] Indeed, he does not deny the importance of integration but emphasizes that the evaluation of the normativity or the legal status does not indicate the significance of the principle.

In the European Union the evaluation that the requirements of integration are the most important ones regarding the protection of the environment has found its way in the EC treaty. Article six of the EC treaty recognizes integration as a principle of the EU: "environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities (...) in particular with a view to promoting sustainable development."[96] It guides the activities and policies of the European Union and the member states;[97] furthermore the ECJ justified decisions recurring on the principle[98] and expressively

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[91] Sands *Principles* 231.
[92] Noellkaemper "Three Conceptions of the Integration Principle" in *Environmental Policy Integration* 26-29.
[93] Sands *Principles* 254.
[94] Veinla 2008 *Juridica International* 4.
[95] Noellkaemper "Three Conceptions" in *Environmental Policy Integration* 24.
[96] Art 6 EC Treaty.
[97] Davies *Environmental Law* 32, regarding the member states the application is controversial, see Veinla 2008 *Juridica International* 4 who promotes an indirect obligation.
[98] E.g. *Commission v Council* 1991 C-300/89 "Titanium Dioxide" Case ECR I-2867.

confirmed the legal character in the case Greece v Council.[99] Even with the legislative basis, the legal character of the integration principle has been proven difficult to define.[100] Indeed environmental requirements have to be considered, but they do not automatically trump other policy aims.[101] Additionally, the court control is limited due to the scope of interpretation; only in the event of manifest non-compliance intervention measures can be taken.[102]

In sum, a general assessment of the legal nature of integration in the light of the different aspects and dimensions it points at seems to be challenging. Integration of environmental issues into other areas of policies at least has achieved an aim of policy-making in international environmental law; depending on the legislative source integration might also legally oblige the actors. Apart from the question of its normativity, the importance of integration allows the characterization as a principle regarding both the European system and international environmental law. [103]

2.4 The Goals of the Principle

Generally, integration in environmental law seeks to establish good environmental governance and a high level of protection of the environment. Collier defines three points of objectives namely: achieving sustainable development and preventing environmental damage; removing contradictions between and within policies; and finally the realisation of mutual benefits and making policies mutually supportive.[104] The first aim very generally points to some reasons for protecting the environment; especially sustainable development is linked to integration and therefore depends on its effective implementation. But ultimately every special concept in environmental law aims the overarching goal of protection. Therefore it seems productive to narrow the view on the objectives.[105] Colliers second goal – the removal of contradictions of government policies – focuses on coordination of environmental governance which reflects an important part of integration, but again is not unique to it because every good policy-making is characterized by coordinated policies.[106] The same problem arises with Collier's third distinguishing feature; any policy should seek to mutually benefit other policy sectors and support them.

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[99] *Hellenic Republic v Council of the European Communities* 1990 62/88.
[100] Veinla 2008 *Juridica International* 3.
[101] *Germany v Parliament and Council* 1997 Case C-233/94.
[102] Veinla 2008 *Juridica International* 7.
[103] Veinla 2008 *Juridica International* 4.
[104] Collier *Energy and Environment* 36.
[105] Lafferty & Hovden 2003 *Environmental Politics* 6.
[106] Lafferty & Hovden 2003 *Environmental Politics* 7.

Starting from the counter term of integration which is fragmentation, one can emphasize the environmental goal of a high degree of environmental protection brought about by a cross-media approach which avoids shifting pollution from one media to the other.[107] In the decision-making process the ecological goal is to balance interests and to consider the total effects of pollution expected from the activity on all components of the environment. The European law especially highlights, in Article 11 *The Treaty on the Functioning of the European Union* (TFEU),[108] the substantive goal to protect the environment as a unit. In contrast, institutional and legislative fragmentation describes weaknesses regarding environmental compliance and enforcement which the integrated approach tries to avoid.[109]

Obviously, the main ecological goal of implementing the integration principle is to strengthen the protection of the environment. Thereby it seems difficult to elaborate the unique feature of using the integration principle for achieving the overarching goal of environmental protection. But the characteristic of integration is that it puts special emphasis on the interconnectivity of the different media and the need to holistical governance in order to reach the overarching goal of environmental protection. In contrast, fragmentation is the main threat to integration.

Contrary to the ideal of integrated and holistic policies and frameworks, fragmentation in different forms is often reality. Both governmental structures and legislation can be fragmented. The term *structural or institutional fragmentation* – in contrast to an integrated system – points to the institutional organisation. Institutions responsible for environmental governance are horizontally fragmented between the different levels of government and vertically fragmented between the different line functionaries of the levels.[110] Vertically the three spheres of government – the national, the provincial and the regional sphere – are often jointly responsible for environmental matters. In every sphere governmental tasks can be divided between different departments and line functionaries; thus responsibilities are also horizontally fragmented. Fragmentation of the institutional level is provoked because their organization follows the "media-division";[111] hereafter one department is responsible for air pollution, the next one for water pollution, and so forth. Furthermore *legislative fragmentation* occurs in vertical and horizontal form as well. In so-called horizontal fragmented systems an applicant has to deal with different statutes providing for

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[107] Sands *Principles 167*.
[108] European Union *The Treaty on the Functioning of the European Union* C 326/47 26.10.2012.
[109] Compare with chapter 2.3.
[110] Nel et al *Strategies to integrate* 4.
[111] Robinson (1999) *Econ Dev Q* 246.

numerous procedures and processes.[112] Vertically fragmented systems influence institutions and legislation.[113] They are characterized by numerous institutions and statutes on different legislative levels concerned with one environmental aspect or media. In practice, environmental law often regulates single media instead of following a cross-sectoral approach; sectoral fragmentation describes the result of having different applicable framework regulating one environmental media. Integrated and holistical approaches require a single environmental framework dealing with environmental law and implementing coherent compliance and enforcement mechanism. Fragmentation of the different levels is interconnected and mutually influences each other. Legislative fragmentation induces disjointed governance structures, which results in fragmented governance processes.[114]

Fragmentation might have different reasons; for example, a country can suffer from historical developments which have caused fragmentation.[115] Then again, developing countries traditionally have not spent much effort in the implementation of a coherent and sustainable legislative framework because their priority clearly relies on the development and the improvement of their societies.[116] Then again federalism is opposed to concentrated powers in one environmental authority because it provides for contribution of powers and checks and balances between the different functionaries. Furthermore, the distribution in both regions and provinces leads to a lack of clarity regarding responsibilities. Glazewski also emphasizes that the broad variety of topics environmental management deals with provokes fragmentation; management of natural resources, pollution control and prevention and land and waste management can barely be managed in a coherent way.[117]

The integrated, holistic approach ideally circumvents the disadvantages of fragmentation. Hereafter, integration is concerned with the avoidance of inefficiencies on the operational level, naming environmental, financial and governmental inefficiencies. Having different authorities responsible for authorisation processes, governmental efforts regarding some topics are duplicated and overlap; then again, other environmental issues remain uncontrolled. This inefficient governance might lead, for example, to inconsistent requirements imposed by different authorities,

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[112] Kotzé 2006 *PER/PELJ* 79.
[113] Kotzé 2006 *PER/PELJ* 77.
[114] Nel et al *Strategies to integrate* 2.
[115] Kotzé 2006 *PER/PELJ* 79 deduces South Africa's highly fragmented environmental regime to colonialism and Apartheid.
[116] Kotzé 2006 *PER/PELJ* 89.
[117] Glazewski *Environmental Law* 108.

and additionally might produce superfluous costs on both sides.[118] On the one hand, the state has to bear the costs of its different state organs working simultaneously on the same procedure. On the other hand the applicant is forced to follow different authorization processes and provide, for example, the same information in other forms but different processes. The delayed decisions produce extra costs for investors and harm the economy;[119] additionally, the financial burden presents a negative factor for state developments.[120] Not least, fragmented legislation and institution lead to unsustainable environmental governance because it is contrary to integrated environmental protection which deals with the environment holistically. Thus fragmentation results in unsustainable service-delivery; ineffective and inadequate administration is caused.

2.5 Dimensions of Integration

It has to be distinguished whether the integration of environmental policies is aimed to take place within the environmental sector, then the process is called internal integration, or in between other non-environmental sectors.[121] The latter is described with the term external integration. For the purpose of analysis, the distinction is helpful although policies cannot always be clearly assigned to one of the categories.[122]

2.5.1 External Integration

External integration means the implementation of environmental issues into other policies.[123] This dimension of integration is therefore closely linked to sustainable development which is especially concerned with the connection between economic, social and environmental questions; here integration refers to the recognition of environmental and social factors in the economic development.[124] Hence in international environmental law external integration is valued as one element of sustainable development.[125] This concept presents the most prominent example to bring environmental considerations in accordance to other policy sectors.

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[118] Nel et al *Strategies to integrate* 3.
[119] Nel et al *Strategies to integrate* 2.
[120] Nel et al *Strategies to integrate* 3.
[121] Distinction: Biermann 2009 *Int Environ Agreements* 355; Francis 1992 *Envtl L* 22; Davies 1992 *Envtl L 139*; compare with the Netherlands' policy planning process which distinguishes between internal and external integration.
[122] Eg Climate change policies are for the north an environmental issue, for the south it involves economic policies.
[123] Faure 2000 *Eur Envtl L Rev* 178.
[124] Faure 2000 *Eur Envtl L Rev* 178.
[125] Sands *Principles* 215-217.

Another term used in respect of external integration is horizontal or sectoral integration;[126] it also refers to the cross-sectoral strategy of a central authority for integration responsible to coordinate and supervise the integration process, for example in the context of permitting. The authority could be a governmental body or an inter-governmental body mandated to deal with inter medial issues.[127] It has to communicate the goals of the integration policy to the sectoral authorities and represents the interests of the environment against the policies of the other policy sectors. Indeed, the balancing of interests finally might lead to judicial litigation; that represents another important platform to discuss the integration of environmental topics into other policy areas.[128] Indicators for the implementation of the cross-sectoral integration are a long term strategy for sustainable development, scheduled targets for the implementation of integration policies and environmental impact assessment and strategic environmental assessment in all policy sectors.[129] Sands concludes the collection of environmental information, for example in the case of environmental impact assessments, is the legal consequence of the commitment to integration.[130] Furthermore, external integration is highly dependent on internal integration; an integrated environmental policy offers itself to be easier integrated into other policies than a bundle of policies concerned with single media protection.[131]

The outstanding commitment of the states to the concept of sustainable development indicates the general acceptance of the relevance to integrate other policies in the specific sectors. Nevertheless, it has been observed that in practice external integration is not broadly implemented probably because it raises undesired conflicts between the departments.[132] In particular federal states struggle with the implementation of external integration, because the system inclines to both fragmented administration and legislation. Generally it was proposed that external integration especially has to take place in the core decision-making processes, such as budgeting; furthermore the environmental forces within the different sectors have to be supported to realise especially sustainable development.[133]

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126 Davies 1992 *Envt L* 144.
127 Lafferty & Hovden 2003 *Environmental Politics* 15.
128 Lafferty & Hovden 2003 *Environmental Politics* 16.
129 Compare with 3.2.3 Environmental Impact Assessment.
130 Sands *Principles* 215.
131 Davies 1992 *Envtl L* 145.
132 Lafferty & Hovden 2003 *Environmental Politics* 17.
133 Davies 1992 *Envtl L* 145.

2.5.2 Internal Integration

Internal integration has to be understood in a broader and in a narrower sense.[134] Broadly it describes the protection of the environment in a holistic and ecological way; it considers the environment as a unit and follows a cross-media approach. The OECD defines the broad concept in the context of integrated pollution control as: "taking into account the effects of activities and substances on the environment as a whole and the whole commercial and environmental life cycle of substances when assessing the risks they pose and when developing and implementing controls to limit their release."[135] It especially takes into account the interdependency of environmental media and the danger of regulating one media with the consequence of shifting, for example, pollution to another medium.[136] To avoid that effect, internal integration seeks to regulate the environment as a whole instead of regulating separate media, such as air, water and land.[137] Hereafter permitting of single media has to be avoided and a holistic permit of all environmental media has to be implemented.[138]

The narrower understanding of internal integration is concerned with policy-making. Another expression used for that form of integration is vertical integration. Vertical in this context does not point to the division of power granted by the constitution but refers to the governmental landscape of national departments and ministries focusing on processes and policies in non-environmental sectors.[139] Integration of environmental policies in the context of vertical integration means the "greening" of that sector; it refers to the extent to which sectoral objectives have been amended by environmental objectives to achieve policy decisions considering both the sectoral concerns and environmental issues.[140] Indicators showing the advance of integration of environmental policies are the initial assessment of environmental challenges the sector addresses, the establishment of sectoral environmental action plans, environmental impact assessment and strategic environmental assessment. Furthermore, effective policy-making integrating environmental concerns should formulate scheduled targets and should implement reporting obligations about the environment concerned policies in the sector.[141]

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[134] Ehrling 2001 *Tul Envtl LJ* 6.
[135] Council of the OECD 1991 *Recommendation on Integrated Pollution Prevention and Control* Art. I a.
[136] Ehrling 2001 *Tul Envtl LJ* 6.
[137] Ehrling 2001 *Tul Envtl LJ* 6.
[138] Compare with the discussion in chapter 3.
[139] Lafferty & Hovden 2003 *Environmental Politics* 12.
[140] Lafferty & Hovden 2003 *Environmental Politics* 13.
[141] Lafferty & Hovden 2003 *Environmental Politics* 13.

In the context of licensing and permitting, internal integration is also referred to as the harmonization of environmental law. Regarding the harmonization, one has to distinguish between form and substance. Formally, procedures, licences and the sectoral acts can be harmonized; in contrast the substantive goal is the assessment of all environmental impacts regarding one activity implemented by a single authority which finally grants a single permit. Harmonization points at disintegrated systems in which multiple authorities grant different sectoral licenses. Hereby integration is seen as the remedy to harmonize fragmented procedures, authorities or even the licences.[142] This thesis is, in particular, concerned with integrated permitting; hence these different dimensions are discussed now.

Internal integration itself has different dimensions. One approach distinguishes between substantive, procedural and organizational integration.[143] Thereby the main goal of integration is *substantive integration*. It means that state authorities are supposed to examine a project in regards of all possible environmental implications on all affected media; the different environmental interests have to be weighted and balanced.[144] The highest degree of substantive integration is achieved through the implementation of a *holistic multimedia permit.* To grant such a permit, the impacts of the planned activity are separately assessed; then the findings are compared and positive and negative impacts of the environment are rated. That results in a final overall judgement about the viability of the project. With this approach, the interconnectivity of the media and the environment is reflected in the decision making of granting a permit. In practice, the problem occurs that no common denominator[145] or common metric[146] exists to compare the impacts of the activity on the different media, such as air, water and land. Indeed the rating of impacts on the separate media is possible, whereas their comparison is difficult to achieve. One approach is risk-based decision-making; the relative risk of an activity regarding the different media is assessed. Hereby scientific knowledge and methodological gaps are problems to consider by evaluating the risks.[147] In fact, the complexity of the assessment of single media has resulted in the single media administration instead of cross-cutting multi-media administration. To avoid the problematical overall judgement, *additive multimedia permits* only conduct a single media review; hereby only

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142 Faure 2000 *Eur Envtl L Rev* 177.
143 Ehrling 2001 *Tul Envtl LJ* 8; Irwin "Introduction" in *Integrated Pollution Control* 3 8 mention as fourth category product-oriented integration.
144 Tolsma 2010 *Elni Review* 85.
145 Ehrling 2001 *Tul Envtl LJ* 9.
146 Davies 1992 *Envtl L*142.
147 Davies 1992 *Envtl L*142.

integration on a lower level is achieved.[148] European law tries to solve the problem of the immeasurability of environmental goods by setting certain criteria and determining *Best Available Techniques*. The so-called BREF-documents guide the environmental decisions-making authorities by setting criteria and determining the environmental friendliest alternatives.[149] Taking a cross-media approach BREFs use mathematical and softer, discursive criteria as measurement.[150]

Procedural integration focuses on the administrative approval process which presents an administrative procedure. It describes the integration of activities related to the granting of a permit; different state authorities or responsible persons within an authority coordinate their efforts.[151] Ideally, in an integrated system a single permit combines all media; that option is also called concentration.[152] Especially with a view at the approval process, procedural integrated systems are referred to as one-stop authorization shops.[153] Nel, Kotzé & Snyman highlight that the one-stop shop administered by one responsible authority reflects the highest possible integrated administrative organization; ideally, it is based on a single environmental framework dealing with the holistic environmental authorization.[154] If, on the other hand, single media permits under separated legal acts continue to exist under a less integrated procedural system, the coordination of procedures becomes important to make internal integration at least to a certain extent possible.[155] Thereby the coordination of the procedures can cover different aspects, for example the unique submission of documents, the same renewal date for different permits regarding a single activity or other single requirements within the different procedures.

Organizational integration is especially concerned with the organization and the structure of the administrative authorities; to integrate administration, ideally one single agency is mandated instead of more authorities having competences regarding the permitting of an activity.[156] The regulatory organization is highly dependent on procedural integration; given procedures are integrated, the administrative organization usually might be integrated as well.[157] Different levels of integration are possible; sole, shared and lead competences come into consideration regarding

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148 Ehrling 2001 *Tul Envtl LJ* 9.
149 Tolsma 2010 *Elni Review* 85.
150 Tolsma 2010 *Elni Review* 85.
151 Ehrling 2001 *Tul Envtl LJ* 9.
152 Ehrling 2001 *Tul Envtl LJ* 9.
153 Nel et al *Strategies to integrate* 18.
154 Nel et al *Strategies to integrate* 18.
155 Tolsma 2010 *Elni Review* 82; eg the IPPC Directive leaves it to the member states to implement an integrated decision-making procedure through either a single permit or the coordination of the procedures.
156 Kotzé *A legal Framework* 158.
157 Ehrling 2001 *Tul Envtl LJ* 10.

either a single medium or all media holistically.[158] If authorities share the competence, they have to consider and to weigh the findings of the other departments. In contrast, a leading department indeed has to consider the opinion of other affected authorities, but finally decides about the granting of the permit. A sole competence enables the department to make a decision without considering other authorities; they are only involved because they are obliged to provide necessary information for the granting authority.[159] The latter presents the most integrated version of organizational integration.

2.6 Related Environmental Governance Principles and Concepts

2.6.1 Sustainable Development - The Ultimate Goal of Integrated Permitting Schemes

The notion of sustainable development has become the buzz word of environmental law in the last decades. It strongly influences environmental politics and governance on the national and international level today.[160] The evolution of the notion of sustainable development can be traced back to certain international events. The *Stockholm Declaration* elaborated on the link between society and economy,[161] but did not directly connect it with environmental topics; only Art 11 considers the environment as a factor to be weight in economic decisions. Particularly, the link between economy and development was elaborated in 1987 by the World Commission on Environment and Development, which demanded the reorganization of administration based on sustainable development.[162] Nevertheless, Judge Weeremantry in his separate opinion in the 1997 case concerning the Gabcikovo-Nagymaros project derives that the notion of sustainable development is one of the ancient ideas of humans and by no means new.[163] But the Commission formulated, in "Our Common Future", the most popular definition and coined the term sustainable development including environmental, economic and social dimensions; hereafter sustainable development is "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[164] It highlights the integration principle as the basis

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158 Ehrling 2001 *Tul Envtl LJ* 10.
159 Ehrling 2001 *Tul Envtl LJ* 11.
160 UNEP *Issues Brief # 3*; compare also with OECD *Governance for Sustainable Development*.
161 *Stockholm Declaration* Art 8.
162 Feris *PER/PELJ* 2010 79.
163 ICJ: Judgement in Case Concerning the Gabcikovo-Nagymaros Project 37 ILM 162 (1998).
164 *Brundtland Report* ch 1 sec 27; it further explained the concept as a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and

that sustainable development relies on.[165] Hereafter, both principles were further developed to finally result in the 1992 *Rio Declaration*. Its principle four states that environmental protection shall constitute an *integral* part of the development process in order to achieve sustainable development and hence cannot be considered in isolation from it.[166] The *Rio Declaration* marks a cornerstone in the development because it gave the integration principle a legal status in international environmental law.[167] It becomes obvious that sustainable development cannot be achieved without following an integrated approach of environmental protection; thus the two notions are strongly interrelated and mutually dependent.

Notwithstanding the establishment of sustainable development, its "core normative content"[168] is still indefinite; to clarify the content of the notion it may help to subdivide it into its components. Sustainability refers to different aspects; one aspect is ecological sustainability which is concerned with the use of renewable resources, such as forests and lakes, and could be described as the need to ensure the necessary environmental conditions which enable life especially in regard to future generations.[169] Another aspect inherent in sustainability is the social aspect; it stresses the endeavour of societies to keep alive their traditions and social ideals.[170] Social sustainability has to be distinguished from today's emphasize of the social aspect in ecological sustainability.[171] Finally, development means changes in society. Taking the components together the notion of sustainable development traditionally is understood as changes which are performed in a sustainable way.[172] Through its development three main facets of sustainable development have been distilled; these are the use of natural resources in a sustainable way, economic development and environmental protection.[173] It has been observed that sustainable development turned from meaning the sustainable use of natural resources to a more anthropocentric and socio-centric view at development;[174] the concept has been broadened and deepened over time. Nevertheless, because of the ambiguity of the notion, it is frequently prescribed by elements composing the principle. Sands, for example, finds four legal elements of

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institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspiration.

165 *Brundtland Report* ch 2 sec 72.
166 *Rio Declaration* Principle 4.
167 Lafferty & Hovden *Environmental Politics* 4.
168 Field 2006 *SALJ* 409.
169 Lele *World Dev* 609.
170 Barbier 1987 *Environ Conserv* 104.
171 Lele *World Dev* 610.
172 Lele *World Dev* 610.
173 Schrijver *Sustainable Development* 212.
174 Schrijver *Sustainable Development* 218.

sustainable development; they are the need to preserve natural resources for the benefit of future generations, the sustainable utilization of natural resources, the pursuit of equity in the use and allocation of natural resources and finally the integration of environmental protection and development.[175] Schrijver lists seven main elements composing sustainable development; "integration and interrelationship" is not only one of them but it is highlighted as the greatest challenge regarding the concept of sustainable development.[176] In comparison to the other elements, integration probably plays the most important role.[177] Many authors[178] see integration as one of three[179] (or two)[180] pillars of this concept. Concerning the content of integration, it is received opinion that it implies that not only economic or environmental factors have to be taken into consideration, but social and cultural aspects as well.[181]

2.6.2 Cooperative Environmental Governance

As seen in the context of fragmentation, environmental governance is commonly exercised by different levels and spheres of government. Each authority presents a unique body and performs its task independently. Nevertheless, responsibilities might be shared with other governmental bodies;[182] thus the organs are "individually but jointly responsible"[183]. Regarding the different spheres and line functions of governance, *cooperative governance* advocates coordinating procedures and policies in order to achieve cooperation and coordination.[184] To solve conflicts and turf wars, governance of the national, international and intra-national level shall work in a form of co-operative federalism.[185] Especially with a view at fragmented environmental governance and overlapping responsibilities, co-operative governance presents an important instrument to ensure integrated and holistical decision-making in the environmental field and to align processes. In terms of integration, cooperative governance refers to internal integration which is especially concerned with the alignment of governance on the operational level.[186]

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175 Sands et al *Principles* 253.
176 Schrijver *Sustainable Development* 225.
177 Feris 2010 *PER/PELJ* 84.
178 Sands *International Environmental Law* 253.
179 French *Sustainable Development* 56.
180 In contrast Winter "A Fundament and Two Pillars" in *Sustainable Development* 24 27 describes the concept of a foundation and two pillars.
181 French *Sustainable Development* 56.
182 Bosman et al 2004 *SAPR/PL* 413.
183 Bosman et al 2004 *SAPR/PL* 413.
184 Nel et al *Strategies to integrate* 7.
185 Nel & Du Plessis 2001 *SAJELP* 8.
186 Nel et al *Strategies to integrate* 7.

Domestic frameworks use various tools to implement the *co-operative governance* into their legislature; conflict-resolution instruments are one important example. Environmental implementation and management plans shall ensure co-ordination and harmonisation with existing plans and policies.[187] On the operational level especially, environmental authorisations often suffer from lacking co-operative structures. In sum, co-operative governance presents one strategy to improve fragmentation of policy processes.[188]

2.6.3 Integrated Environmental Governance

Regarding internal integration on the other hand, the concept of *integrated environmental governance*[189] emerged and became an established term in environmental governance. It considers the interrelationship between the different environmental media and aims to coordinate the different responsible governmental institutions and spheres of government.[190] Furthermore, all possible legal tools have to be considered by *integrated environmental management*.[191] But a single definition for these diversified concepts hardly exists; one rather has to see their meaning in the context of the specific situation.[192] Critics have argued that the term integrated environmental management is used interchangeably with environmental impact assessment in South Africa. This is confusing because the instrument of environmental impact assessment especially provides for the collection of information of environmental impacts on an early point of the development process.[193] Therefore it presents one very common legal mechanism to ensure comprehensive environmental protection. In contrast, integrated environmental management forms the overarching concept embedding different instruments.

One should also distinguish between integrated environmental management and integrated environmental governance.[194] The latter refers to the institutions of state and processes regulating activities and impacts of the environment in a sustainable way.[195] Its main target is the alignment of administration and processes. Against that, management describes the tool of skills and instruments used to ensure sustainable environmental management and to handle negative

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187 Nel et al *Strategies to integrate* 9.
188 Nel et al *Strategies to integrate* 5.
189 Eg Chapter five of the South African National Environmental Management Act (NEMA).
190 Bosman et al 2004 *SAPR/PL* 414.
191 Nel & Du Plessis 2003 *IAIASA Conference Proceedings* 94-95.
192 Noellkaemper "Three Conceptions" in *Environmental Policy Integration* 24.
193 Shelton & Kiss *Handbook* 38.
194 Nel and Du Plessis 2003 *IAIASA Conference Proceedings* 138.
195 Feris 2010 *PER/PELJ* (13) 174-175.

environmental impacts of activities caused by any organ of state.[196] Notwithstanding this distinction, it must be noted that in practice the terms are often used interchangeable; especially on the national level the concept is used with different meanings. Generally, integrated environmental management represents a technique to achieve environmental governance goals, such as the precautionary approach, the polluter pays principle, the cradle-to-grave principle and the principle of an integrated and holistic approach; finally it also gives effect to sustainable development.[197]

2.6.4 Holistic Governance

Ideally governance is structured in a holistic way. The notion of holism refers to the consideration of the environment as a whole.[198] Environmental governance especially demands a holistic view at the environment as an interconnected unit because the division between the different media seems artificial and unnatural. Instead holistic environmental governance promotes a cross-cutting view at interrelated concepts, such as sustainable development. Therefore existing structures, processes and policies are combined to be effectively used. Kotzé explains the path to reach this ideal.[199] At the starting point governmental units co-exist; they have to collaborate and to co-ordinate their efforts. To improve their governmental efforts they co-operate and achieve a more integrated system.[200] Following that, highly integrated governance is implemented. This stage is called holistic governance; its main characteristics are procedures and policies structured in an efficient way to improve service-delivery and finally achieve sustainable development.[201] It is connected to procedural integration which refers to the concentration and the alignment of administrative procedures into a single process; ideally it is implemented by a one stop authorization shop.[202] Thus the concept of holistic governance presents one instrument and the first guiding principle[203] promoting the overarching aim of integrated environmental governance.

2.6.5 Environmental Policy Integration

Another term which emerged in the context of modern environmental governance is e*nvironmental policy integration* (EPI). Especially in Europe, it has achieved a "quasi-constitutional

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196 Kotzé *A legal Framework* 44.
197 Nel et al *Strategies to integrate* 32.
198 Compare with the wording in the IPPC Directive para (9): "The objective of an integrated approach to pollution control is to prevent emissions into air, water or soil [...] in order to achieve a high level of protection for the environment as a whole."
199 Kotzé 2006 *PER/PELJ* 94.
200 Kotzé 2006 *PER/PELJ* 94.
201 Kotzé 2006 *PER/PELJ* 94.
202 Kotzé *A legal Framework* 156.
203 Guruswamy 1989 *Wis L Rev* 464.

status".[204] Most industrialized countries committed themselves to implement the concept.[205] Its raise has to be seen in parallel to that of the notion of sustainable development which is also called its "mother concept".[206] Whereas the *Brundtland Report* has been promoting the coherent consideration of the confronting goals of economic and social development and environmental protection, *environmental policy integration* was introduced as a first order principle for achieving sustainability.[207]

Nevertheless different interpretation of objectives of *environmental policy integration* are possible; a strong environmental reading highlights the need to avoid that the sustainable use of natural resources becomes subsidiary to other policy goals; this interpretation sees environmental protection as the principal objective.[208] In contrast, a less environmental friendly interpretation highlights the need of fair balancing of the contradicting goals.[209] On the European and national level *environmental policy integration* often refers to external integration.[210] Namely it is concerned with how to integrate topics regarding the environment into other the environment protection affecting policies; therefore the concept is especially concerned with the governing process.[211] On the global level the term is used for internal integration as well, because it seems to be difficult not to address the main problems of institutional and organizational fragmentation.[212] Furthermore *environmental policy integration* also has been called sectoral integration; in that context the term sector refers to the governmental units which have to integrate environmental protection.[213] Finally, it has to be noticed that some authors simply use *environmental policy integration* as a synonym for the integration principle.[214]

In sum, *environmental policy integrations* is commonly used in the broadest possible sense of integration as a process continually ensuring that topics concerned with environmental

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[204] Jordan & Lenschow 2010 *Env Pol Gov* 147.
[205] EEA *Technical report* No 2/2005 14-15.
[206] Jordan & Lenschow 2010 *Env Pol Gov* 147.
[207] Jordan & Lenschow 2010 *Env Pol Gov* 147.
[208] Lafferty & Hovden 2003 *Environmental Politics* 9.
[209]Jordan & Lenschow 2010 *Env Pol Gov* 147.
[210] See EPIGOV project which is a co-coordinating and synthesising research on environmental policy integration and multi-level governance conducted by several European research institutions; Biermann et al 2009 *Int Environ Agreements* 354.
[211] Jordan & Lenschow 2010 *Env Pol Gov* 150.
[212] Biermann et al *Int Environ Agreements* 354.
[213] Persson *Environmental Policy Integration* 12.
[214] Lafferty & Hovden 2003 *Environmental Politics* 6; Lafferty distinguishes between horizontal and vertical environmental policy integration, vertical refers to intra-departmental integration and horizontal to a cross-sectoral strategy, Lafferty *Adapting Government Practice* 2002; OECD *Adapting government practice* 2001 16.

protection are reflected in the policymaking.[215] It results in changes regarding the organization of both fragmented institutions and administrative processes. Different instruments are used to implement these objectives.[216] It has been criticized that these are mostly soft law instruments and not long-term instruments as the *Brundtland Report* requests. Critics agree that the conversion of the concept into tangible instruments and processes is uneven;[217] additionally the designated influence of the concept on day-to-day policies is far from certain. At the same time its implementation is highly dependent on the support and the driving forces of actors in the environmental sector.[218] Overall the aim of improving policies, procedures and organisation to strengthen environmental governance presents one challenging ingredient to achieve sustainable development.[219]

2.6.6 Integrated Pollution Control and Prevention

Law regulating the prevention or the control of pollution faces typical problems of environmental law governance. Traditionally, in this branch of law single media are regulated; in terms of pollution air, soil and water might be affected and regulated in their specific legal frameworks. This approach fails to address the crosscutting character of pollution; furthermore, it gives raise to shifting pollution from one medium to the other following the "path of least regulatory resistance".[220] In this context the need was recognized to establish a single administrative authority, or at least various cooperating and coordinated authorities, being responsible for the regulation of pollution of industrial activities.[221] The recognition of integration regarding the administration was followed by the expansion to integration of procedures, legislation and the environmental media to be regulated.[222] Especially in Europe, this approach prevailed and led to the granting of the 1996 *Integrated Pollution and Prevention Directive*[223] which converted the concept into European law. Thus the European Union mandates its member states to implement integrated domestic pollution legislation; the directive mainly uses the instrument of integrated

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215 EEA *Technical report* No 2/2005 7.
216 For example, environmental standards, appraisals, green budgeting and other market-based approaches.
217 Jordan & Lenschow 2010 *Env Pol Gov* 155.
218 Jordan & Lenschow 2010 *Env Pol Gov* 155; EEA *Technical report* No 2/2005 7.
219 EEA *Technical report* No 2/2005 12.
220 Smith *Integrated pollution control* 2; Hughes et al *Environmental Law* 495.
221 Kotzé 2007 *SAPR/PL* 39.
222 Kotzé 2007 *SAPR/PL* 39.
223 Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control replaced by Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 on the same matter.

environmental authorization to implement the concept.[224] Therefore it lists certain industrial activities which require an environmental authorization and demands integrated authorization processes. Other regions and countries use the European directive as guiding model to implement integrated permitting and to follow the directive´s approach.[225]

Thus *integrated pollution and prevention control* (IPPC) considers the negative environmental impacts on all environmental media through an industrial installation. Integration refers to institutions (organizational integration), the legislation they rely on and the scientific analyses (substantive integration) they make.[226] It is a regulatory system based on technical examination using techniques, such as that of "best available techniques" and the technique of "best available techniques not entailing excessive costs", to assess the impacts of pollution. One important instrument of integrated pollution control and prevention are integrated authorisation procedures; therefore it presents a "command and control instrument".[227] The legislation gives certain pollution standards, whereas the authorization specifies individual requirements for the respective activity. The authorization is granted by a single authority which holistically considers the pollution of all environmental media based on an integrated authorization process and structures; ideally a "one-stop authorization shop" instead of multiple authorization authorities and procedures is established.[228] Furthermore the integrated pollution control and prevention regime is characterized by an integrated legislative framework. It aims to minimize negative environmental impacts caused by pollution on the environment as a whole: therefore it follows the "cradle-to-grave" principle looking at the product life circle holistically.[229]

In sum, *integrated pollution and prevention control* seeks integration in form of procedural, organisational and substantive integrations.[230] It is based on both the concept of sustainable development because the producing of waste is one inevitable side effect of human development and the preventive principle because main goal presents the avoidance of waste. Environmental

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[224] The Appendix of the Integrated Pollution and Prevention Directive (Annex: Guidance on integrated pollution prevention and Control) lists the issuing of single permits covering all releases and processes, land-use planning and regulation of services such as transport; use of economic instruments; encouraging development of cleaner technologies; and covering whole life cycle issues in industry management plans.

[225] OECD *Guiding Principles* 3.

[226] Kotzé 2007 *SAPR/PL* 39.

[227] Wolf & Stanley *Wolf and Stanley on Environmental Law* 259; Jans "The relationship" in *Integrated pollution prevention and control* 45.

[228] Wolf & Stanley *Wolf and Stanley on Environmental Law* 259.

[229] Emmott & Haigh 1996 *J Envtl L* 302.

[230] Kotzé 2007 *SAPR/PL* 43.

authorizations are particularly important instruments to implement the concept of integrated pollution and prevention control.

3. Integrated Permitting Schemes

Since the increasing recognition of integration and its related environmental governance concepts, such as cooperative environmental governance and integrated pollution control and prevention, states and regional and international bodies seek to realise advantages of the concepts benefits. This chapter elaborates the international growth in integrated permitting regimes by looking at different jurisdictions. Integrated permitting is introduced as an instrument in environmental governance. Hereafter key theoretical components are unpacked; they characterise successful integrated permitting regimes. The *OECD guidelines for integrated environmental permitting*[231] distinctly differentiate factors which have to be considered; whenever it is appropriate, these guidelines are quoted. The thesis highlights institutional aspects of permitting including the application process, the responsible authority and the legislation it is build on.[232] Taking these points into account, characteristics of an integrated approach regarding the responsible authority, the content and the scope of the permit and the underlying legal framework are assessed. Furthermore the integrated environmental procedure and the application process are assessed in terms of their capability to promote integration. The assessment below follows the normal administrative procedure for permitting.

3.1 International Growth in Integrated Permitting Regimes

Internationally the advantages of integrated permitting have been recognized, in particular when states were addressed by the challenges of fragmented or contradictory decisions in environmental governance. The insight was gained that permitting based on "media-division"[233] is not the most effective approach to realise high environmental standards.[234] Consequently many states have developed or plan to develop integrated permitting regimes.[235] An additional motivation for streamlining permitting processes is to simplify the processes for the benefit of the regulated parties.[236] Some American States, such as California, Minnesota and New York, explicitly improved their environmental permitting regime in order to achieve both more efficient regulatory systems

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[231] See n 35.
[232] OECD *Guidelines* 15.
[233] Robinson 2002-2003 *Econ Dev Q* 246.
[234] DeWitt *Civic environmentalism* 5-6.
[235] Fourth International Conference on Environmental Compliance and Enforcement 1996 1.
[236] Rabe 1995 *SLGR* 2010.

and improved environmental protection.[237] In the United States, the main driver for an integrated approach was the Conservation Foundation.[238] Since the 1980s, approaches have taken place to improve the environmental governance system; the respective legislature is constantly restructured.[239]

In Europe there has been a constant move forward to integrated permitting. In 1969, integrated permitting was introduced in Sweden and only three years later in Denmark.[240] The United Kingdom started promoting integrated pollution control under the leadership of the Royal Commission on Environmental Pollution[241] and emphasized that environmental pollution in these days and in the future will be caused by cross-media pollution.[242] This movement also led to the implementation of integrated permitting in 1990.[243]

Internationally the OECD promoted integrated pollution and prevention control already in the early 1990s.[244] In 1984, the European Union started both integrated pollution control and the transition to an integrated regulation.[245] In terms of waste pollution the EU member states have mostly tried to incorporate the concept in order to give effect to the *Integrated Pollution Prevention and Control Directive* in 1996, which is based on the *OECD Council Recommendation on Integrated Pollution Prevention and Control*.[246] But the process is far from finished. The European countries still struggle to address the challenges they are confronted with to implement the guidelines of IPPC and integrated environmental governance and permitting.[247] Institutional fragmentation is especially common. Most of the European countries have different authorities which issue environmental authorizations;[248] one exception hereof is the Netherlands.[249] In contrast, the countries of Eastern Europe, Caucasus and Central Asia (EECCA) mostly have

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237 Rabe 1995 *SLGR* 2010.
238 See Conservation Foundation *Controlling Cross-Media Pollutants*.
239 Fourth International Conference on Environmental Compliance and Enforcement 1996 2.
240 OECD *Guiding Principles* 9.
241 Royal Commission on Environmental Pollution "Best Practicable Environmental Option" (Rep. No. 12, 1988), "Managing Waste: The Duty of Care" (Rep. No. 11, 1985), "Tackling Pollution Experiences and Prospects" (Rep. No. 10, 1984), "Air Pollution Control: An Integrated Approach" (Rep. No. 5, 1976).
242 Royal Commission on Environmental Pollution No. 10 6.35.
243 OECD *Guiding Principles* 9.
244 OECD Council Recommendation (90)165/FINAL of 31.1.1991.
245 Council Directive 84/360/EEC of 28 June 1984.
246 OECD Council Recommendation C(90)164 of 31.1.1991.
247 Fourth International Conference on Environmental Compliance and Enforcement 1996 2.
248 Fourth International Conference on Environmental Compliance and Enforcement 1996 4.
249 See chapter 4.2.1

mandated a single state organ but, in fact, fragmentation occurs because different units within the departments are responsible for the different environmental media.[250]

Then again, although almost all states are very interested in integrated permitting[251] it is remarkable that very little experience exists with holistic integrated permitting to fall back on. Instead states are mostly grouped at the level of development that they are coordinating the permitting process but still create various permits.[252] In sum, states globally are covering all stages of implementation: in Estonia integrated permitting is still a "dream", Bhutan has started to implement institutions, such as a responsible commission and environmental impact assessment.[253] In comparison, an elaborated integrated permitting regime has New Zealand; here a holistical single permit is granted requiring an environmental impact assessment.[254]

3.2 Key Theoretical Components of Successful Integrated Permitting Regimes

Integrated permitting affects different aspects regarding the environmental authorisation.[255] In the following part key components of successful integrated permitting regimes are elaborated on. Firstly this introduction aims to generally embed integrated permitting in the system of environmental governance and to critically reflect its described international growth. Substantively, an integrated permitting regime considers effects on environmental media as building a unit; therefore the permitting regime aims to achieve a high degree of environmental protection in total.[256] For the promotion of integration on the national level, theoretically both regulatory mechanisms, including command-and-control mechanisms, and alternative mechanism, such as incentive-based measures, come into consideration.[257] Regulatory mechanisms are directly concerned with the implementation and the enforcement of environmental legislature. While market based instruments increasingly gain acceptance, nowadays classical regulatory instruments

[250] OECD *Guidelines* 181.
[251] Fourth International Conference on Environmental Compliance and Enforcement 1996 2.
[252] Fourth International Conference on Environmental Compliance and Enforcement 1996 2.
[253] Fourth International Conference on Environmental Compliance and Enforcement 1996 2.
[254] Fourth International Conference on Environmental Compliance and Enforcement 1996 2-3.
[255] The words "permit" and "environmental authorization" are used with the same meaning.
[256] OECD *Guidelines* 13.
[257] Craigie et al "Dissecting" in *Environmental Compliance and Enforcement* 58.

still play an important role;[258] nevertheless a blend of instruments is promoted. Consequently modern permitting also creates incentives to effectively protect the environment.[259]

Especially regarding the implementation of the integration principle, it is considered that in comparison regulatory mechanisms make integration more likely possible.[260] Permitting regimes play a leading role because they exist in every law system regulating the access to natural resources. At the same time permits are strong instruments because non-compliance with the imposed requirements can be enforced by fees or the withdrawal of permits.[261] Thus permitting concretizes legal obligations to pre-established norms and compels the addressee either to obey or to abandon the activity; it has the advantage of clarity and transparency, characteristics which make permitting in particular complying with the rule of law.[262]

Permitting normally does not aim to totally avoid negative environmental impacts, such as pollution, but controls dangerous impacts and the level of their impacts. Different types of permits are possible. Taking permits regulate the number of plants or species which are allowed to be taken out of their natural habitat.[263] Furthermore the requirement of a license is very common in the context of the construction and the operation of installations, especially of industrial sides; also every step of the production process, the use of the product and its trade may require a permit.[264] Often the conduction of an environmental impact assessment is a requirement for the granting of the permit; it obliges the investor to assess the environmental impacts in advance to put the state organs in the position to decide upon whether the planned activity can be authorized.[265] Normally permits are granted in advance to the respective activity; but situations, for example the prior existence of a side falling under the permitting obligation, require retroactive permits.[266] Permits often oblige the addressee to comply with certain requirements over the time of the validity of the permit; for example environmental standards have to be fulfilled and are reviewed on a regular basis.[267] The common approach, generally for air and water, is the application of Environmental

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[258] Niessen *Environmental Law* 106.
[259] OECD *Guidelines* 12.
[260] Niessen *Environmental Law* 106.
[261] Paterson & Kotzé *Environmental Compliance and Enforcement* 186.
[262] Kloepfer *Umweltrecht* 216.
[263] Shelton & Kiss *Handbook* 33
[264] Kiss & Shelton *International Environmental Law* 140.
[265] Shelton & Kiss *Handbook* 37.
[266] Shelton & Kiss *Handbook* 37.
[267] Shelton & Kiss *Handbook 36-37.*

Quality Standards; regulations define the maximum permissible degree of certain environmental impacts in the medium.[268]

Especially with a view at the fragmented environmental law framework, it is obvious that a single activity may require permits under different licensing systems organized by the single environmental media, such as air, water and soil. Single medium permitting therefore presents the traditional approach following the demands of current arisen environmental problems.[269] This type of regulation faces the same criticism as fragmented governance does; especially it is criticised that single media permitting provokes the transfer of environmental problems from one medium to the other. The recognition of these weaknesses led to the discussed international growth in integrated permitting regimes.

Nevertheless criticism about integrated permitting occurred as well; industries having spent a lot of investments to fulfil technical obligations, spurn other expenses due to new requirements.[270] Furthermore representatives of the state organs often might feel negatively towards new permitting regimes because of the experience and knowledge they have gained regarding the former system.[271] This might be especially true because integrated permitting claims special attention of the administrative organs; administrative efforts have to be coordinated and effectuated. In particular, in earlier days the holistical approach has been criticised with the argumentation that the interconnectivity of all media exceeds the possibility to cover the whole field in one policy.[272] But in the light of the environmental problems of our days the call for integrated environmental management has become increasingly stronger and critics became silent because the single media approach has obviously failed to deal with the enormous environmental problems. Additionally, projects with the industry have shown the interest of private stakeholder on integrated permitting; the addressees of integrated permits in particular appreciate the increased flexibility.[273] Academics, governments and non-governmental organization promote integrated environmental governance to improve the environmental situation.[274] Thus the question arises of how integrated permitting regimes are successfully constructed.

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[268] OECD *Guidelines* 12.
[269] OECD *Guidelines* 13.
[270] Rabe 1995 *SLGR* 2010.
[271] Rabe 1995 *SLGR* 2010.
[272] Lindblom *Incrementalism and Environmentalism* in *Managing the Environment* 83.
[273] Rabe 1995 *SLGR* 215-216.
[274] Guruswamy 1989 *Wis L Rev* 516.

3.2.1 Responsible Authority

In fragmented systems an array of different departments and agents are responsible for environmental permitting. Presenting the main regulatory instrument, permits and licences are granted by the different authorities disjointed amongst their line functionaries. Co-operative authorisation procedures would enable to increase alignment and co-operation.[275] To implement institutional integration a central lead agent can be mandated who coordinates and promotes co-operation regarding the administrative structures and procedures among several authorities.[276] To address vertical fragmentation, especially in the traditional three tier system the different levels of governance on the regional, provincial and national level have to be included. Regarding the different line functionaries, horizontal fragmentation has to be avoided or at least minimized through coordination and co-operation. Nel recommends to strengthen in the beginning of the integration process informal and voluntary forms of cooperation without changing legal provisions.[277] These relationships are later formalized and turned into legally obligating forms of cooperation and collaboration; the mandates of environmental authorities responsible for decision-making are streamlined and then concentrated.[278] On a higher level of integration, one single authority can be employed for issuing and overseeing environmental authorizations and other related administrative decisions.[279] This agency also is responsible to serve as clearinghouse for information the would-applicant need to get about the permitting procedure and permit requirements; this centralised source of contact and information helps to integrate permit activities since the applicant is not confronted with various state organs.[280] The *OECD Guidelines* for integrated permitting provide three alternatives for institutional organization; on the lowest integrated level departments responsible for certain media coordinate their efforts within the scope of the permitting procedure to achieve finally an integrated permit.[281] Secondly, often the situation occurs that one agency is responsible for environmental authorizations but other authorities have to grant permits regarding other aspects, such as security aspect, or a single medium, often water, is excluded from the environmental permit. In that context the *OECD Guidelines* suggests to organize the procedure in such a way that the draft environmental permit is sent to the other affected departments which include their requirements and comment on the environmental authorization;

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[275] Nel et al *Strategies to integrate* 18.
[276] Also called structural integration, see chapter 2.3; Kotzé 2007 *Comp & Int'l LJS Afr* 478.
[277] Nel et al *Strategies to integrate* 16.
[278] Nel et al *Strategies to integrate* 17.
[279] Kotzé 2007 *Comp & Int'l LJS Afr* 477.
[280] Robinson 2002-2003 *Econ Dev Q* 248.
[281] OECD *Guidelines* 181.

the final permit is granted by the environmental agency.[282] The third scenario ultimately aimed to implement institutional integration is the one-stop-authorization shop; here the environmental permitting agency grants the authorization and has to deal with the interests of other governmental stakeholders whereby the final decision remains at the environmental agency.[283]

The determination of the appropriate responsible authority presents a crucial point; especially in federally constructed countries it might contradict the division of powers to mandate a single body for all environmental decision making. The alignment of responsibilities should be differentiated between the kinds of decision which are taken; matters affecting regional development should be assigned to the respective regional authority. In its guiding principles for integrated permitting the OECD additionally propose that it should be differentiated between large industrial installations, administered by the national authorities, and smaller installations administered by the regional and municipal authorities.[284] That enables most practicable and realistic administrative decisions. In contrast, installations of national importance, for example because of the adverted environmental or economic impacts or because of the supra-regional character, are mostly assigned to national departments.[285] They are also appeal bodies for decisions of regional departments.[286] Although the implementation of a single environmental decision body represents a step forward to institutional integration, it has to be seen critically if it does not take the type of decision making into account. Therefore the institutional integration should concentrate the mandate for decision making but differentiate between the types of decision.

3.2.2 Application Process and Permitting Procedure

Besides the mandated authority, content and granting of the environmental authorization can be integrated. Looking at the application procedure, the application of the developer precedes the procedure of granting a permit. The application has to be submitted to the determined authority. The *OECD Guidelines* therefore advise to implement pre-application consultations to help submitting in a comprehensive application of good quality.[287] Since the information the applicant provides in the application builds the basis for both the permit and the decision of granting or refusing the permit, cooperation should take place between the would-applicant and the

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[282] OECD *Guidelines* 181.
[283] OECD *Guidelines* 181.
[284] OECD *Guiding Principles* 11.
[285] OECD *Guidelines* 184.
[286] OECD *Guidelines* 184.
[287] OECD *Guidelines* 38.

responsible authority.[288] Therefore the *OECD Guidelines* suppose to mandate a responsible person in the department and to ensure the communication between private and public parties.[289] Within this process, the content of the application can be further determined.

For the application a standard application form shall be used to ensure that all the required information are submitted; in general, one can distinguish between general information required for all application and additional information required for certain installation.[290] The application can be considered invalid if it is lacking basic information; these are the identification of both the installation with the planned activity and of the operator.[291] Additionally the used techniques, the expected emissions and other case relevant details have to be revealed.[292] Other fundamental requirements which are leading to invalidity are, for example, that the installation does not require an integrated permit at all.[293] The scope for integrated environmental permitting has to be legally defined; usually small or medium-sized enterprises, as well as installations with no significant negative impact on the environment are excluded.[294] Especially, for industrial activities an environmental impact assessment is often required.[295]

In the further procedure the competent state organ examines the application in depth; therefore the planned activity has to fulfil the requirements which are set by the respective law. Cross-consultation with other affected agencies should take place to ensure that the planned activity does not conflict with other legislation or interests of other authorities then the responsible one.[296] Furthermore the participation of the public has to be guaranteed.[297] In that context the connection between integrated permitting schemes and coordination becomes clear. The *OECD Guidelines* out that the less integrated the processes and institutions are, the more cross-consultation is needed to achieve comprehensive and integrated permits. Otherwise overlapping and fragmented decisions might occur when the state organs set contradicting requirements regarding behaviour or installation.[298] It is important to schedule when the various stakeholders are obliged to comment on the application to avoid illegitimate delays in the procedure. Advising from

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[288] Kotzé 2007 *Comp & Int'l LJS Afr* 490.
[289] OECD *Guidelines* 38.
[290] Kotzé 2007 *Comp & Int'l LJS Afr* 491.
[291] OECD *Guidelines* Chapter IV.
[292] OECD *Guidelines* Chapter IV.
[293] OECD *Guidelines* 39.
[294] OECD *Guidelines* 201; compare with chapter 3.2.7 for alternative permitting and notification schemes.
[295] See chapter 3.2.3 Environmental Impact Assessment.
[296] Kotzé 2007 *Comp & Int'l LJS Afr* 492.
[297] Compare with public participation in chapter 3.2.3.
[298] OECD *Guidelines* 51.

the stakeholder agencies might contain considerations of other regulatory regimes, special knowledge about certain sensitive environmental areas or regional particularities.[299] Considering these points and the information collected in the public participation process, the permitting authority proves the ability to authorize the planned activity. To ensure the comprehensiveness of the integrated permit the OECD suggests building permitting teams of various experts of the state departments responsible for the different media, such as air and water.[300] Given a single permitting authority already exists, this approach could still ensure the quality of comprehensive integrated environmental permitting. Furthermore the consultation with the applicant before the final granting of the permit may avoid unnecessary appeals and streamlines the process.[301] The permit has to be refused if the overall assessment comes to the conclusion that negative environmental impacts are too large and not acceptable, and that the application does not comply with the statutory requirements or that the applicant does not fulfil the personal requirements, for example liability, the law imposes on the applicant.[302]

3.2.3 Environmental Impact Assessment

Integrated permitting regimes interact with other regulatory and non-regulatory instruments.[303] The most important other instrument related to permitting is the *environmental impact assessment*; it is one instrument which is especially suitable to achieve both sustainable development and integrated environmental governance.[304] The integrated approach presents a hallmark for the environmental impact assessment.[305] The world-wide used and, by many countries law required tool puts the government in the situation to make comprehensive decisions about the capability to authorize activities and installations because it contains the detailed study of the expected environmental impacts.[306] Often integrated into licensing procedures and land use planning the developer is required to undertake this study and submit the results in written form to the designated state organ.[307] The impact assessment precedes the permitting; therefore it can later serve as basis for integrated permitting.

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[299] OECD *Guidelines* 51.
[300] Appointment of Permit Determination Teams OECD *Guidelines* 54.
[301] OECD *Guidelines* 56.
[302] OECD *Guidelines* 56.
[303] OECD *Guidelines* 17-18.
[304] UNEP *EIA and SEA* 6.
[305] UNEP *EIA and SEA* 113.
[306] Preiss 1999 *NYU Envtl LJ* 310.
[307] Kiss & Shelton *International Environmental Law* 130-131.

Since the 1980s, international agreements commonly have requested the conduction of an environmental impact assessment.[308] The European Union granted a community directive obliging all member states to implement environmental impact assessment in their domestic legislation.[309] Hence recent domestic environmental legislation of the European countries, but also all over the world, provide the conduction of environmental impact assessment regarding activities which are "likely to significantly harm" the environment.[310] Also financial institutions, such as the World Bank and the European Bank for Construction and Development, demand environmental appraisals from the borrower in order to prove the sustainability of the investment.[311] Although no obligatory rules exist how the environmental assessment has to be conducted, some common points of examination can be concluded. Typically a holistical impact assessment lies at the core of the environmental impact assessment; the precedent scoping has determined the aspects the study had to cover.[312] In this respect, the developer can profit from integrated permitting schemes because he can use the permitting requirements to define the scope of the assessment.[313] The study identifies impacts, measures and weights them, than the different options are assessed. Whether the *environmental impact assessment* has to be conducted is normally based upon lists of activities, lists of particularly valuable areas or criteria describing the nature of harm to be expected.[314] The determination whether a particular action requires an assessment in the light of the listed activities is called screening.[315] Another crucial point for the success of the assessment is public participation; information provided by the concerned public can be used for the scientific analysis, might avoid former failure and improve the practicability of the assessment results.[316] Furthermore the concerned public has the right to be notified and consulted with in terms of democratic transparency and legitimacy. The involvement of the public offers an additional point of scrutiny and enhances the chances of sustainable decisions.[317] Regarding integration, Bohne evaluated the inherent conceptual conflict between public participation and substantive integration;

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[308] For example, Espoo Convention (1991), Climate Change Convention (1992), UNCLOS (1982), Principle 17 Rio Declaration (1992).
[309] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment OJ L 175 05.07.1997 0005-0015.
[310] Other formulations are the likelihood of measurable effects or appreciable or significant harm, Kiss & Shelton *International Environmental Law* 133.
[311] Kiss & Shelton *International Environmental Law* 134-135.
[312] Murombo 2008 *PER* 16.
[313] OECD *Guidelines* 17.
[314] Kiss & Shelton *International Environmental Law* 130-131.
[315] Murombo 2008 *PER* 16.
[316] Panel on Public Participation in Environmental Assessment and Decision Making, National Research Council Public Participation in Environmental Assessment and Decision Making 139.
[317] Murombo 2008 *PER* 9.

he finds and proves the tendency of public participation to degrade integration.[318] Bohne leads the finding back to the broadening of topics and interests public participation initiates.[319] Thereby he emphasizes that public participation does not suspend integration but that the latter, asking for clear objectives and the establishment of priorities, contradicts the involvement of the public; therefore both positions have to be balanced.

Regarding the assessment, integration takes place in different dimensions: firstly all environmental impacts of every media are holistically assessed; social and economic impacts are also taken into account to achieve a holistic analysis.[320] In sum, three forms of integration can be distinguished: substantive integration refers to the dimensions of impacts, which are considered (social, economic and ecological) and their separate impact assessments taking place at the policy level, at the planning level and regarding the project cycle.[321] Horizontally the impact assessments of the different levels are concentrated into one central assessment (horizontal integration). The assessment finally has to be integrated into the decision-making; that can take place on different levels, for example the planning level.[322] Furthermore, one can distinguish horizontal and vertical integration regarding lapse of time; vertically integration takes place over a longer period of time and in regular sequences regarding certain form of assessments and specific management tools. The horizontal integration refers to a specific short-term project in which the impacts of all media and the environment as a whole are holistically assessed.[323] Finally, *environmental impact assessment* demands co-operative environmental governance because the decision making state organ has to consider other policy fields which are covered by the impact assessment as well; cooperation and coordination with other organs is necessary. Thus internal integration, which aligns governance on the operational level, is promoted as well.[324]

In terms of the capability to achieve integration, there are also critical voices about the incommensurability of impacts on the environment as a whole; because of the lack of methodological tools the states often go back to single media impact control.[325] An investigation about the assessment of cross-media impacts in the context of environmental impact assessment in the member states of the European Union has shown that the governmental decision-making

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[318] Bohne *Quest for Integration* 503.
[319] Bohne *Quest for Integration* 503.
[320] UNEP *EIA and SEA* 113.
[321] UNEP *EIA and SEA* 114.
[322] UNEP *EIA and SEA* 114.
[323] UNEP *EIA and SEA* 115.
[324] Nel et al *Strategies to integrate* 7.
[325] Bohne *Quest for Integration* 491.

based on the impact assessments barely makes any references to interconnected effects; usually also substantive integration does not take place.[326] That is a lost opportunity because the procedure clearly offers possibilities for an integrated approach. Furthermore, it is expected that environmental and equality aspects might be subordinated to economic points due to the integrated impact assessments,[327] this has to be avoided to ensure the equal weighting of all impacts which are assessed. It became clear that the environmental impact assessment offers an opportunity for both integration and integrated permitting, at the same time certain aspects challenge the integration process.

3.2.4 Holistic Multimedia Permit

The granted permit has to contain all affected media holistically, the activity which is allowed to be carried out and the area which is affected. Furthermore limitations and conditions within the permit have to be set; they are especially suitable to enable a differentiated authorization which holistically considers the various media. One important instrument often used in that context is the setting of emission ceilings. Two different approaches are possible; the permit can declare the objective it seeks to implement or the method how the objective is being achieved.[328] The former is often preferred because of the flexibility it concedes; additionally it can be linked with other tools, such as the environmental management plans, strategies and industry plans.[329] Other requirements might refer to reporting and measurement obligations, personal requirements of the involved people and requirements to study less environmental impacting techniques.[330]

The permit is totally integrated if it combines the authorizations dealing with all media and all applicable environmental and other laws; then no other permit than the environmental authorization is needed to plan and to construct the installation and to execute the operation of the installation.[331] Integration in that context refers to substantive integration because it allows for the weighting and balancing of the interests in one single authorization.[332] But often the permitting schemes exclude building permits or certain media regulation which are considered to be too important to be part of the integrated permit; than the alignment of the procedures and their coordination becomes very important. Nevertheless, it is questionable whether the exclusion of

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[326] Bohne *Quest for Integration* 494.
[327] UNEP *EIA and SEA* 114.
[328] Kotzé 2007 *Comp & Int'l LJS Afr* 494.
[329] Kotzé 2007 *Comp & Int'l LJS Afr* 494; see chapter 3.2.7.
[330] Kotzé 2007 *Comp & Int'l LJS Afr* 494.
[331] Kotzé 2007 *Comp & Int'l LJS Afr* 495.
[332] See chapter 2.5.2.

certain aspects out of the integrated permit is able to reflect the importance of this environmental media and whether it improves the environmental protection in comparison to integrated permitting. Indeed it contradicts the idea of integrated permitting; the fragmentation effects and the disadvantages of single media permitting have to be kept in mind. Hereafter a holistical multimedia permit is promoted.

3.2.5 Follow-up Procedures and Remedies

The permitting scheme has to include follow-up procedures which define both the reporting obligations of the permit holder and the monitoring tasks of the responsible authority. Offences of the permit holder against statutory requirements or requirements set by the permit may lead to private or criminal liability. Furthermore, the authority has to periodically check the conditions made in the issued authorizations; when the circumstances have changed, the authorization has to be changed, as well.[333] Examples for changes are improved technical means and thus changed "Best Available Technique" or changes of statutory requirements which affect the permitted activity.[334]

The applicant can appeal the decision either because the authority has refused to grant the permit or because the permit is combined with conditions or limitations the applicant is not willing to fulfil.[335] After a certain amount of time the appeal is not allowed anymore; this rule ensures legal security for stakeholders and the state organs. Furthermore, the appeal has to fulfil certain formal requirements to be valid and has to contain certain information and the reasoning for the legal remedy. In the following process the authority, which can be the same or a devolved one,[336] will assess its decision in regards of the statutory requirements and the hearing of the appellant; whether the weighting of the interests is part of the assessment in the appeals procedure, depends on the respective law of the procedure.

3.2.6 Holistic Environmental Framework

In sum, the integrated permit is most likely based on a holistic environmental law framework which concentrates media-specific and sectoral acts.[337] Kotzé suggests building a single law based upon a broad definition of the notion of environment.[338] Such an approach presupposes

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[333] Kotzé *A legal Framework* 175.
[334] Kotzé *A legal Framework* 176.
[335] OECD *Guidelines* 211.
[336] The OECD recommends a separate inspection and enforcement authority, OECD *Guiding Principles* 11.
[337] Kotzé "Environmental Governance" in *Environmental Compliance and Enforcement* 124.
[338] Kotzé "Environmental Governance" in *Environmental Compliance and Enforcement* 124.

the acceptance that environmental law builds a distinctive branch of law,[339] which can be summarized in one act. Nowadays, with a view at distinctive environmental law principles at both the domestic and the international level, this is broadly accepted.[340] Thus this field of law could be codified holistically in one environmental law framework. This codification would include all fields of environmental law concerned with the environmental media, such as water and the marine environment, air and soil, but also these environmental laws which handle specific activities or problems environmental law is concerned with, such as mining, energy, agriculture and biodiversity, as well as waste and planning and land use. This comprehensive environmental framework would contain general principles and rules and enforcement and compliance instruments.[341] These precepts are normally put in the front of the act; here duties and rights are stated, basic concepts and principles defined and the basic administrative organisation is set including instruments therefore.[342] Additionally, it should mandate a single responsible authority to control and enforce the law; therefore the different mandates have to be combined. To disburden the regulatory mandate, the framework would follow the approach to establish incentive based mechanisms and voluntary measures as well.[343] This form of integration comes as close as possible to ultimate integration and is called the "one-stop shop". Extensive changes in the legal framework are necessary to implement such a system in an existing fragmented system.[344] Nevertheless it has the advantage that irreconcilable conflicts and inconsistency are easier be avoided; furthermore the codification increases transparency and integration in the context of formal harmonization. Procedural integration is ideally achieved through a single environmental law framework which builds the basis for the one-stop authorization shop.[345] Additionally, the framework promotes substantive integrated environmental permitting; the different environmental interests have to be weighted and balanced under the holistic framework.[346] In sum, it is assumed that the trade-offs the authorities have to undertake in that context lead to better protection of the environment.[347]

Nevertheless, the disadvantages of a holistical environmental framework have to be kept in mind as well; there is the inherent risk that a codification prevents the development of the field of

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[339] Kloepfer *Umweltrecht* 32.
[340] Macrory "The Scope of Environmental Law" in *European Environmental Law* 3.
[341] Kotzé "Environmental Governance" in *Environmental Compliance and Enforcement* 125.
[342] Cowen 1989 *THRHR* 2 6 9 11 13 23-25: Allgemeiner Teil; Veinla 2000 *Juridica International* 64.
[343] Kotzé "Environmental Governance" in *Environmental Compliance and Enforcement* 125.
[344] Kotzé "Environmental Governance" in *Environmental Compliance and Enforcement* 124-125.
[345] See chapter 2.5.2.
[346] Tolsma 2010 *Elni Review* 85.
[347] Tolsma 2010 *Elni Review* 82, also note the criticism of Bohne *JEEPL* 2008 30-33.

law because it creates an area of stability which is defended from quick changes in reaction to recent environmental threats.[348] Veinla also sees a problem if the codification is using principles and general formulation and requirements which are less detailed and less precise then the sectoral law was; both the applicant and the agents of the state organs might have problems regarding the interpretation and the application.[349] The last argument seems especially general and might be advocated against every law using principles and guiding ideas. Then again the formulation and the drafting of an environmental code absorb a lot of time and personal resources the state has to spend during the preparation time.[350]

Nevertheless there are voices that advocate that only the drastic step of implementing a holistic environmental codification can address fragmented and unsystematic environmental law.[351] Instead of reforming existing statutory framework, the codification might durably purify, harmonize and unify a field of law.[352] The development of a holistic codification also offers the possibility to make more profound substantive changes then partially reforming sectoral law or just restating the existing fragmented law.[353] It is also important to notice that under especially federal law systems administrative and legal competences are divided between the different tiers of the state; therefore legislative changes become necessary to enable the implementation of the holistic governance. Nevertheless the branch of law to be codified has to meet certain preconditions that make the legal reform possible; besides the mentioned elaboration of environmental law as an area of law, dissatisfaction with the existing law and the political will to change this situation are necessary, as well as a certain quality of the material what has to be unified.[354] Applying these criteria at the field of environmental law the international growth in integrated permitting and the claim for integration in environmental law, in general, shows the movement to change the approach whereas existing national law often is very detailed and with a view at normative and material quality worth to be codified holistically in a single act.

3.2.7 Variations of the Traditional Environmental Authorization

Usually the lawmaker provides variations of the traditional environmental authorization. The *OECD Guidelines* in this regard question if these instruments are also capable to implement

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348 Veinla 2000 *Juridica International* 63.
349 Veinla 2000 *Juridica International* 63.
350 Veinla 2000 *Juridica International* 63.
351 Reenen 1994 *Stell LR* 214.
352 Reenen 1994 *Stell LR* 214.
353 Reenen 1994 *Stell LR* 214.
354 Reenen 1994 *Stell LR* 216.

integration.[355] But the environmental legislation necessarily has to provide procedures and a simplified permitting scheme for installations which are not subject of the integrated permitting regime, especially for small or medium-sized enterprises.[356] *General rules*, more *flexible permits* and *"umbrella" authorizations* are discussed; all these variations offer possibilities for integration.

With a view at the deregulation movement the permitting scheme should consider the implementation of *general rules* which are applicable to small installations or to those installations which cause minimal negative environmental impacts to the environment.[357] Instead of having a complex individual assessment of statutory requirements, general rules comprehensively prescribe criteria which make an individual assessment unnecessary; for the developer it implies that a notification is sufficient instead of running through the whole application process.[358] The implementation of general rules instead of permitting schemes serves both sides. The industry generally appreciates less administrative burden and might be incentivized to invest and to develop; the state organs are disburdened.[359] Especially if they could not keep up with the administration of the authorization processes, general rules conducts the improvement of efficiency and governance. Resources for compliance control and enforcement are released, which might lead to improved environmental protection; furthermore the competitiveness of the industry is raised.[360] Even more deregulation in comparison to rules, present *notification or registration* requirements;[361] the respective law prescribes that the developer has to notify the responsible authority that the operation of a certain activity is planned or the way of performing a permitted activity is going to be changed. If the authority has objections it can intervene, otherwise the developer can perform the notified activity.

Another variation is the introduction of more *flexible permits*; instead of issuing strict rules through environmental authorizations, the permit only defines some basic requirements whereas the applicants commit themselves within environmental management plans, industry plans and other self-regulatory instruments.[362] Besides the above mentioned advantages, the literature detects a possibility to improve integrated environmental protection; the more flexible authorization enables the industry to holistically assess the environmental impacts on the environment as a unit

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355 OECD *Guidelines* 15.
356 OECD *Guidelines* 201.
357 Kotzé 2007 *Comp & Int'l LJS Afr* 499.
358 Kotzé 2007 *Comp & Int'l LJS Afr* 500.
359 Kotzé 2007 *Comp & Int'l LJS Afr* 499.
360 Kotzé 2007 *Comp & Int'l LJS Afr* 501.
361 Kotzé 2007 *Comp & Int'l LJS Afr* 503.
362 Kotzé 2007 *Comp & Int'l LJS Afr* 502.

by its own.[363] It therefore leads to internal integration promoted trough private stakeholders instead of state organs. The advantage that the developer can choose the way how to reach environmental protection goals, might improve the standard of environmental protection because he is better informed about his installation.

A so-called *"umbrella" authorization* integrates permits of different installations in a certain area constructed and operated by a single investor in one environmental authorization.[364] The broad authorization covers various activities and enables the permitting authority to consider the environmental impacts of the whole business holistically instead of examining its piece parts. Thus the umbrella authorization leads to integrated permitting in regards of internal integration;[365] the environment is considered as a unit influenced by the various impacts of several installations and activities. Furthermore internal integration is promoted in terms of harmonization.[366] Both procedures and substance are integrated; ideally the developer has to undertake one application process and the single environmental authority holistically grants the authorization covering all environmental media and all installations he is operating. That offers the developer the possibility to undertake technical and procedural changes to improve the eco-friendliness of his business at these points where it is ecological and economical most reasonable.

3.3. Summary and Recommendations for Promoting the Move to Integrated Permitting

Different levels of integration regarding permitting are possible. Total integration is only given if one permit is granted by one single authority after the conduction of a single administrative procedure under a comprehensive holistic framework.[367] To address fragmented environmental governance Kotzé suggests following short-, medium- and long-term strategies.[368] To avoid extensive legislative and administrative changes, it is recommended to exploit the possibilities given by the various constructs which underpin integrated permitting. Thus in the short-term the governance should especially promote sustainable development in policy-making and governance. Fragmentation should be addressed and therefore integration should be pushed forward; policy strategies, such as integrated environmental governance and environmental policy integration help translating theoretical ideas into practice. Furthermore, co-operative environmental governance

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[363] Kotzé 2007 *Comp & Int'l LJS Afr* 502.
[364] Kotzé 2007 *Comp & Int'l LJS Afr* 504 gives the example of the Amsterdam Airport.
[365] Internal integration in its broader understanding see chapter 2.5.2.
[366] See chapter 2.1.
[367] Kotzé *A legal Framework* 156.
[368] Kotzé *A legal Framework* 275.

presents a crucial aspect to address institutional and organizational fragmentation; cooperation and coordination between the environmental and other authorities shall be optimized. With a view at improving integrated permitting, in the beginning the existing procedures have to be streamlined and improved in regards of efficiency, public participation and transparency.[369] The determination of best available techniques helps the state organs to weight and balance the compatibility of a planned activity with environmental protection. In the medium-term especially, procedural integration is aimed; therefore fragmented environmental permits are combined in a single administrative procedure based on a single act.[370] One responsible authority carries out environmental permitting under the act. Since a single state organ often lacks the technical and scientific knowledge support structures have to be implemented. Given a single authority responsible for environmental permitting exists, in the long term a one stop shop is strived to be implemented. It necessitates repealing all sectoral legislation; instead a single environmental act dealing with all environmental media is granted and contains all procedures and all substantive rules.[371] In this comprehensively integrated system integration extends to substantive, organizational and institutional aspects.

[369] Kotzé *A legal Framework* 275-277.
[370] Kotzé *A legal Framework* 277.
[371] Kotzé *A legal Framework* 278.

4. Experience with Integrated Permitting Schemes– Learning from the Netherland's Integrated Environmental Permitting Scheme

4.1 Background

The Netherlands looked at a long history of industrial development.[372] There is also the geographical particularity of the small country having a high population density.[373] From the beginning, these factors made environmental regulation particularly important in the Netherlands. In 1875, the first environmental permit simply regulated single installations. The raising complexity of both techniques and environmental problems have led to sectoral and detailed law regulating specific media or specific environmental problems in the course of time.[374] Hereafter the Netherlands had a fragmented environmental law regime based on sectoral and fragmented acts; both environmental authorisation and the whole environmental governance followed a media-based approach.[375] It was believed that detailed, sectoral legislation was more capable to protect the environment holistically because tasks and competencies are divided in order to establish experts for every environmental sector.[376] Hereafter, the sectoral acts regulated air, soil and water; furthermore they dealt with environmental problems, such as waste, hazardous wastes, nuclear energy and noise.[377] The environmental affecting activities required sectoral authorizations and put a high administrative burden on the various state organs within the scope of the multiple administrative procedures. After a deregulation movement in the 1980s the 1987 Brundtland Report has especially gotten off the ground a development of integrating both environmental law and governance to ensure that the environmental problems of our days are handled in a comprehensive and integrated way and to satisfy the duty to protect the environment laid down in

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372 Nilsson *Enforcing* 263.
373 Nilsson *Enforcing* 263.
374 Kotzé 2007 *Comp & Int'l LJS Afr* 480-481.
375 Kotzé 2007 *Comp & Int'l LJS Afr* 480-481.
376 Kotzé *A legal Framework* 220.
377 The Air Pollution Act of 1970 (*Wet inzake de luchtverontreiniging*), the Soil Protection Act of 1986 (*Wet bodembescherming*); the Groundwater Act of 1981 (*Grondwaterwet*), the Waste Products Act of 1977 (*Afvalstoffenwet*), the Chemical Waste Act of 1976 (*Wet chemische afvalstoffen*); the Environmental Hazardous Waste Act of 1985 (*Wet milieugevaarlijke stoffen*); the Nuclear Energy Act of 1963 (*Kernenergiewet*), the Noise Nuisance Act of 1979 (*Wet geluidhinder*).

the 1983 Dutch Constitution.[378] The Act on general provisions concerning environmental health[379] was granted and presented the first attempt to integrate procedures and the used standards in the different sectors; at the same time the various sectors required their separate licences, for example, for pollution.[380] The reform resulted in the 1993 Environmental Management Act (EMA),[381] which was promulgated in order to streamline environmental governance and environmental authorization in particular. EMA promoted both internal and external integration without having a totally integrated approach.[382] The Netherlands was one example of those countries which have not totally integrated the scope of their integrated permits; for example, water and nature protection were exempted from the scope of regulation; nevertheless the scope of the act was wide.[383] Close inter-ministerial cooperation was established which was considered to be very helpful to avoid inconsistent and fragmented decisions.[384] But against the background of the Integrated Pollution Prevention and Control Directive[385], EMA had to correspond with new from the European Union set requirements; indeed both frameworks – the new IPPC Directive and EMA – were concerned to horizontally integrate environmental governance in order to avoid sectoral and fragmented regulations. Nevertheless the Dutch environmental legislation showed some shortcomings and a less normative approach than the European guidelines. For example, regarding pollution the IPPC Directive follows the requirements of "Best Available Techniques"; in contrast EMA followed the principle of "as low as reasonable achievable"; the different approaches demand different levels of protection. In this respect, changes of the environmental legislation became necessary.[386] In order to improve integrated permitting the Dutch government granted the Wet algemene bepalingen omgevingsrecht (Wabo), what is the Environmental Licensing (General Provisions) Act.[387] Wabo presented also a reaction to complaints of businesses which struggled to deal with especially land use and building issues affecting environmental permits; with the introduction of the deregulated system savings of about R 435 Mio per year were expected for the private sector through reduced administration.[388] Though it is remarkable that no new requirements

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[378] Nilsson *Enforcing* 264; Art 21 Dutch Constitution (Grondwet, 1983): "It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment."
[379] Wet algemene bepalingen milieuhygine (13.6.1979) Stb 442.
[380] Faure 2000 *Eur Envtl L Rev* 176.
[381] Environmental Management Act of 1992 (Wet Milieubeheer).
[382] Kotzé *A legal Framework* 222, Seerden & Heldeweg *Environmental Law* 348-349.
[383] Kotzé 2007 *Comp & Int'l LJS Afr* 485-468.
[384] EEA *Technical report* No 2/2005 19.
[385] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version).
[386] Kotzé *A legal Framework* 218.
[387] Wet algemene bepalingen omgevingsrecht (Wabo).
[388] Hobma & Shiba 2010 *The Journal of The Land Institute* 5.

and assessment criteria were implemented in the new act but that it mainly aimed to streamline and integrate permits and processes.

On October 1th, 2010 Wabo as the new Licensing Act entered into force in the Netherlands. It does not contain transitional regulations, thus authorisations granted before that date remain valid and are administered in accordance with EMA. Indeed Wabo replaces the former act regarding the permitting rules; but EMA is still the central environmental framework legislation complemented by substantive legislation.[389] Chapter 2 of Wabo contains the rules regarding environmental permitting; in conjunction with sector legislation and lower level framework it composes the permitting scheme.[390] The lists of activities falling under the permitting obligation, regulations and more detailed rules have to be found mainly in the Environmental Law Ordinance[391] and other lower level legislations. Main goal of the new framework is the implementation of a single, quick and direct procedure and the tasking of a single authority for environmental permitting; the legislator had especially the interests of entrepreneurs and businesses in view.[392]

4.2 Assessment of the permitting regime on the basis of the key theoretical components of successful integrated permitting regimes

4.2.1 Responsible Authorities

The Netherlands traditionally follows a decentralised approach regarding public power;[393] hereafter national, provincial and municipal agencies are mandated to carry out environmental governance. On the national level a "mega-ministry" has been implemented with the Ministry of Housing, Physical Planning and the Environment (VROM) which is also responsible for environmental permitting.[394] Primarily it is responsible to direct the lower authorities in the exercise of environmental regulation.[395] Following the decentralized approach, Wabo Art 2.4.1 entitles mostly the municipalities to actually carry out the administrative procedure and to grant environmental permits; only if the applicant plans an activity which is of national or regional

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389 Nilsson *Enforcing* 264.
390 Nilsson *Enforcing* 267.
391 Besluit omgevningsrecht of 2010 laying down rules for the implementation of the Environmental Licensing (General Provisions) Act.
392 VROM "Summary" 2008 1.
393 Chorus et al *Introduction* 336.
394 EEA *Technical report* No 2/2005 19.
395 Wabo Art 2.34, 5.24.

importance than the respective national or regional authorities are responsible.[396] This distinction in general seems reasonable because the municipal authorities are closer on the everyday developments. Then again, national authorities still have the mandate to decide on projects of national importance. That is because the geographically responsible municipality might follow its special, regional interest without considering the national economic and environmental interests. Furthermore this division follows the trend to decentralize governance in the Netherlands.[397] At the same time it is in accordance with the OECD Guidelines.[398] Accordingly over 400 municipalities in the Netherlands are empowered to decide about environmental permitting on the local level;[399] responsible is that municipality in which the activity mainly takes place.[400] The implementation of the respective municipality as a single responsible authority leads to internal integration in the form of organizational integration.[401] The municipality has sole authority; only in the case of the statement of no objections of the former responsible authority the authorities share their competences.[402] Wabo hereby removed the former, in terms of organization, fragmented system with multiple involved authorities and came institutionally closer to the one-stop-authorization shop the OECD describes in its guidelines as the most advanced scenario.[403] But the institutional integration is still not comprehensively in the Netherlands. Since the environmental permit does not include the water law the water boards of the state are responsible for water management and discharge regulation. Nevertheless the devolvement of the task presents a challenge for the municipalities because of the broad scope of the permit. The authority has to consider various environmental and non-environmental aspects; thereby might especially the municipalities not be very well equipped regarding finances and personal to make these decisions. Furthermore it could become a problem that the over 400 municipalities decide inconsistently and contrary; in that context cooperation between the municipalities becomes important, they have to work closely together to avoid inconsistencies.[404]

4.2.2 Application Process and Permitting Procedure

The application process is streamlined as well; a single application form is provided in electronic form. Furthermore, Wabo implements one set of criteria which have to be examined in

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[396] Wabo Art 2.4.2, 2.4.3.
[397] Chorus et al *Introduction* 336.
[398] See chapter 3.2.1.
[399] Hobma & Shiba 2010 *The Journal of The Land Institute* 2.
[400] Wabo Art. 2.4.1.
[401] See chapter 2.5.2.
[402] See chapters 2.5.2 and 4.3.2.
[403] See chapter 3.2.1.
[404] Hobma & Shiba 2010 *The Journal of The Land Institute* 5.

the environmental application process regardless the type of activity or installation in question.[405] That simplifies remarkably the application process for the applicant; it is transparent which information have to be provided and what aspects are examined. The outcome of the application process is one single permit which can be repealed by a single remedy.[406] Besides transparency and predictability Dutch environmental procedural law in general is characterized by the extensive granting of environmental rights.[407] Dependent on the respective procedure also the public might be entitled to have access to the administrative decision-making procedures; besides the concerned parties.[408] The law distinguishes between two types of processes; firstly a regular preparatory procedure exists and secondly an extensive preparatory procedure.[409] The first one is normally applied for environmental permitting. The extensive procedure is only then used when a complex project is planned which is either expected to have high negative environmental impacts or affects a large group of third parties.[410] Here the wider public is involved in the preparatory process; therefore a draft decision has to be provided open for the public for inspection and comments.[411] In earlier days, the Dutch law followed the principle of action popularis; since 2005 the rules for access to court require a factual interest of private persons, state authorities and associations, for example NGOs.[412] Thus access to court has been narrowed for the public.

Also, the previous responsible authorities are losing their influence but they are still entitled to give advices regarding the sectoral law. In some cases the permitting authority is not allowed to deviate from the so called statement of no objections. Then the statement is a constitutive part of the decision. In the majority of cases the permit authority can deviate from the advice if its reasoning is substantially.[413] Wabo hereby ensures preserving the expertise of the former responsible authorities by conferring the duty to advise the new authorities;[414] especially during the introduction period it seems very reasonable to implement the duty to consult the previous responsible authority to learn from it. Hereby the law assures coordination and cooperation; internal integration is promoted. Thus the Dutch regime follows the *OECD Guidelines*

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405 Wabo Art 2.2 (2).
406 Broerse "The new Environmental Licensing (General Provisions) Act".
407 Nilsson *Enforcing* 275.
408 Defined in Wabo Art 2.1.
409 Wabo Art 3.2 and 3.3
410 Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
411 Dutch General Administrative Law Act Art 3.4.
412 Nilsson *Enforcing* 276.
413 Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
414 VROM "Summary" 2008 2.

which promote cross-consultation and cooperation.[415] In sum, the concentration of the various authorizations in one permit process leads to internal procedural integration. Furthermore the Dutch Environmental Licensing Act implements in terms of procedure a one-stop authorization shop, which is the highest possible form of administrative integration.[416]

The procedure gives strict time limits; hereafter the authorities are obliged to decide upon the granting of the permit within eight weeks, under special circumstances the deadline is extended for another six weeks.[417] For the extensive procedure the timescale is six month with the option of extension for another six weeks.[418] It is remarkable that the permit is declared for granted by law if no decisions have been made until then; that puts the responsible authority under pressure to stick to the timetable and helps streamlining the procedure. [419] Before the final decision to make a six week period is granted within all stakeholders are allowed to comment on the draft permit. This procedure seeks to avoid time consuming appeals and other remedies and allows a quicker and more efficient application process in the interest of both the state and private stakeholders.

4.2.3 Environmental Impact Assessment

Given certain environmental impacts are expected an *EIA* is required for some projects and installations, regardless whether they are private or public. In the Netherlands the procedure has been introduced in 1987 when the European Union granted the respective directives;[420] it was implemented into Dutch domestic law through the still applicable EMA. The law describes for which installations, for example the building of a factory, an assessment has to be carried out;[421] furthermore strategic environmental assessments are conducted for plans and programs. For both assessments the proponent is responsible; but normally the actual research is outsourced to special firms. The aim is the internalization of environmental values; the proponent is supposed to become aware of the negative environmental impacts of the planned project.[422] The Dutch legislator put a high effort into the integration of the EIA into the normal permitting regime.[423] In comparison to other countries, the application of EIA in the Netherlands is seen as quite advanced; that is attributable to the facts that the assessment is embedded into the regular permitting

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[415] See chapter 3.2.2, OECD *Guidelines* 51.
[416] See chapter 2.5.2.
[417] Wabo Art 3.2 (3.9).
[418] Wabo Art 3.3.
[419] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
[420] EU Directives 85/337/EEC.
[421] EMA Art 7.2. Activities and decisions for which an environmental impact statement is required.
[422] Heuvelhof & Nauta *Project Appraisal* 1997 26.
[423] Morrison-Saunders & Arts *Assessing Impact* 64.

procedure and that an advisory committee for EIA has been implemented. The Netherlands Commission for Environmental Assessment (NCEA) is mandated to review the quality of the assessment. It is remarkable and sets the Netherlands apart of other states that the EIA in the Netherlands seems to be successful; many assessments bring direct benefit to the environmental friendliness of the project.[424] This observation is especially worth mentioning because in parallel to the deregulation of permitting processes, environmental impact assessment is fewer required and only for those activities with high negative environmental impacts. In accordance with its purpose in the Dutch regime the EIA provides for public participation;[425] Art 7.10-11 and Art 7.32 EMA regulate the participation of the public. Generally stakeholders can participate during the scoping phase and when the outcomes of the assessment are presented. Also important is the requirement that the decision about a positive EIA has to include a follow up procedure for the time after granting the permit.[426]

4.2.4 Holistic Multimedia Permit

The environmental permit under Wabo integrates around twenty five different permissions, amongst others the mining permit,[427] land use planning exemptions,[428] exemptions under the Monuments and Historic Buildings Act.[429] Furthermore regional and provincial regulations are replaced; that concerns, for example, cutting tree regulations and advertising regulations.[430] The integrated permit contains all these different authorization. In this context, substantive integration is promoted and through the implementation of the holistic multimedia permit at least theoretically ideally implemented; the concentration of the different authorizations aims the weighting and balancing of all environmental impacts within the single authorization.[431] There are, however, important exceptions. For example, under the Wabo regime water law remains excluded; the water boards of the state are responsible for water management and discharge regulation.[432] But at least some integration and deregulation were reached within the separated sector.[433] In contrast it is

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[424] Heuvelhof & Nauta *Project Appraisal* 1997 25 say that 79% of all examined EIA in the Netherlands have high positive impacts.
[425] Morrison-Saunders & Arts *Assessing Impact* 63-64.
[426] Morrison-Saunders & Arts *Assessing Impact* 64.
[427] Art 14-17 Mining Act.
[428] Art 17 or 19 Spatial Planning Act.
[429] §2 Monuments and Historic Buildings Act, compare with Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
[430] Hobma & Shiba 2010 *The Journal of The Land Institute* 5.
[431] See chapter 2.5.2.
[432] See Chorus et al *Introduction to Dutch Law* 338-339, regarding EMA; The fragmentation of water regulations has not changed with the implementation of WABO.
[433] Chorus et al *Introduction to Dutch Law* 379.

notable that the integrated permit contains the building permit besides core environmental permits:[434] thus permitting is predominantly harmonized and internally integrated. Instead of having different environmental and building permits, as well as regulations regarding the protection of the nature, a single environmental permit integrates the different aspects of environmental regulation.

The scope of the permit contains demolition and installation activities, as well as, the construction and the use of certain installations.[435] Thus it holistically covers activities with an impact on the environment as long as the activities are bound to a specific location. Eventually the permit refers to the exercise of the approved activity in a defined region.[436] In contrast activities which are not carried out in a certain location do not need an environmental authorization under Wabo. The framework does not change the former possibilities under EMA to attach conditions to the granting of the permission to carry out a certain activity.[437]

Wabo distinguishes between different types of permits besides the regular environmental permit. The applicant can decide to apply with different sub-applications; therefore the project is divided into several sub-parts which require sub-permits.[438] This has, in comparison to the regular permit, the advantage that the applicant does not need all the information required for the integrated permit, yet. Furthermore the permit situation does not have to be explained in detail, yet. Another possibility is the granting of the permit in two separate phases, which taken together present the environmental permit.[439] The applicant might save both time and money if the activity is not admissible in the first phase and as a result he might change his application or might rethink the project. Thus the different types create a flexible permitting system; indeed the permits are still integrated with regards to content and responsible authority. Nevertheless one disadvantage of providing these different types of permit is the risk of fragmentation of the procedure in different phases or parts of the permit. With this in mind, the system still offers possibilities to further integrate the permitting scheme in order to achieve ultimate procedural integration.

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[434] WABO Art 1.2.1 g.
[435] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
[436] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
[437] VROM "Summary" 2008 1.
[438] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
[439] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.

4.2.5 Follow-up Procedures and Remedies

After the permitting decision, every stakeholder is allowed to seek appeal. Before that, the decision regarding the environmental permit is open for objections by interested third parties; in this respect the General Administrative Law Act with the respective rules regarding objections is applicable.[440] Both the decision regarding the objection and the permit decision are open for appeal. For the former an application for judicial review has to be lodged. Responsible for appeals dealing with permits and general rules, revocation and variations of permits are following the normal administrative appeal route, since the Netherlands do not have special environmental courts.[441] In the first instance the District Courts are responsible and on the next level the Administrative Jurisdiction Division of the Council of State.[442] Besides the concerned parties and other stakeholders, the "concerned public" is also entitled to proceed against administrative decisions as the Dutch General Administrative Law Act states; required is a factual interest to have standing in court.[443] The outcome of the appeal might be the cassation of the administrative decisions or the replacement through a new decision, the directive to take actions or to grant a new decision in order to fulfil the appeal judgment. Because the implementation of general rules and deregulation of environmental permitting are especially accompanied by less opportunities of the public to influence the process,[444] appeals and remedies became more important. They ensure the comprehensiveness of decisions because the process of making environmental decisions provides fewer possibilities for information sharing; that can lead to uninformed and therefore not holistic permitting decisions of the administration.

Furthermore, Wabo implements integrated enforcement mechanisms. Wabo Art 5.3 implements harmonisation and coordination of compliance control and enforcement. The main aim of chapter 5 of Wabo is the uniform and clear enforcement of the law.[445] The responsibility for enforcement lies at the same authority which is also responsible for permitting; under Wabo that are mostly the municipalities. The law provides different enforcement mechanisms: supervisors can be nominated and administrative sanctions, for example fines, can be granted. Regulations are

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[440] Chapter 7 General Administrative Law Act.
[441] VROM "Summary" 2008 3.
[442] Nilsson *Enforcing* 260, 275.
[443] Dutch General Administrative Law Act 8:1.
[444] Nilsson *Enforcing* 278.
[445] Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.

issued to ensure the quality of the enforcement; furthermore provincial authorities control the enforcement undertaken trough the municipalities.[446]

4.2.6 Holistic Environmental Framework

A holistic environmental framework does not exist in the Netherlands. But the former permitting scheme is integrated in regards to two different dimensions, full integration and incidental integration. Licenses regarding specific locations which require most likely other permissions, as well, are fully integrated within Wabo. This applies to permissions, such as building licenses and environmental permits.[447] Some by-laws of the provincial and municipal level are integrated as well, for example advertising display permits and permits regarding street access. Then again other consents are only "latched on" the environmental permit; so called incidental integration. Based on other legal acts, such as the Soil Protection Act[448], the Noise Abatement Act[449], the Nature Conservation Act[450] and the Flora and Fauna Act,[451] the environmental permit will include the permission regarding those acts, as well.[452] One media still not included in the integrated environmental permitting regime is water law; water discharges and water management is regulated in the Water Act which has been recently changed.[453] In the course of the deregulation reform the separate water regime has been simplified and several bylaws been concentrated in the consolidated version of the 2009 Water Act.[454] The Dutch government describes the reached status as "substantive coordination" because different assessment criteria under the sectoral laws are applied.[455]

4.2.7 Variations of the Traditional Environmental Authorization

In comparison to other European Countries implementing the IPPC Directive, the Netherlands are extensively using the instrument of *general binding rules*;[456] it is expected that under the new regulations around 75% of all installations which earlier required environmental

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446 Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
447 For a list of all regulations integrated into Wabo see VROM "Summary" 2008 2.
448 Wet Bodembescherming 1994 (*Soil Protection Act*, Netherlands).
449 Wet Geluidhinder 1979 (*Noise Abatement Act*, Netherlands).
450 Natuurbeschermingswet 1998 (Nature Conservation Act, Netherlands).
451 Flora- en Faunawet 1998 (Flora and Fauna Act, Netherlands).
452 Boekel *Simplifying the System* http://www.martindale.com/environmental-law/article_Boekel-De-Neree-NV_880158.htm.
453 Water Act (Waterwet, consolidated in 2009).
454 Nilsson *Enforcing* 267.
455 VROM "Summary" 2008 1.
456 Blomberg et al 2009 *Utrecht L Rev* 145 indicates that this change has already begun in 2008 before the restructuring of the regular permitting scheme.

authorizations fall now under the requirements of general rules instead.[457] In the course of the deregulation movement, extensive permitting was criticised; hence both the state organs and the private side have been supporting the implementation of general rules.[458] The extended application of general rules seems reasonable because it has become apparent for the Dutch government that most permit procedures lead to the same or almost the same permit conditions; thus the individual authorization process is often not necessary.[459] Hereby the state retains some leverage because it leaves the possibility to intervene and further regulate the activities. But it is also important to recognize that the deregulation is accompanied by a loss of control which is normally provided by the permitting scheme; furthermore the operators are disburden and corresponding the possibilities to check are even more limited because their duties to report have been reduced. One other disadvantage is the lack of possibilities for public participation in comparison to the environmental permitting process; general rules are mainly regulated trough the Ministerial Decree of General Rules for Environmental Regulation, which does not provide for an extended participation process. In any case it is not possible to access the administrative court for general rules.[460] Furthermore the Environmental Management Act and the Activities Decree provide the legal basis for the general rules. Hereafter general rules are applicable to different types of installation, for example, to construction companies, dairy farms, crop farms, dry cleaning companies and petrol stations.[461] The decree distinguishes between three different types of installations; the more negative environmental impacts expected the stricter are the obligations. Hereafter some installations just need to be announced;[462] in contrast the most dangerous activities require an environmental authorization and additionally general rules are applicable.[463] Most activities fall under Group B, show significant environmental impact and have to be notified; the general rules are applicable to them. Some general requirements for all activities are given, for example a general duty of care, and then specific rules regulate certain environmental effects; the general rules implement certain standards and general applicable procedures with the option for the regulatory authority to individually regulate certain aspects. Thus the framework seeks to reach a compromise between general ruling and the need to adjust to specific circumstances.[464] Indeed the activities falling under

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457 Chorus et al *Introduction to Dutch Law* 375.
458 OECD *Guidelines* 206.
459 Nilsson *Enforcing* 265.
460 Art. 8.2 General Administrative Law Act.
461 OECD *Guidelines* 206.
462 Notification for Type A activities with low environmental impact, Ministerial Decree of General Rules for Environmental Regulation Art. 1.10.
463 Type C activities with high environmental impact as defined in Ministerial Decree of General Rules for Environmental Regulation Art 1.2.
464 Nilsson *Enforcing* 266.

general rules are also regulated under the environmental authorization rules; but they are less administratively time-consuming because of the application of general rules.[465]

[465] Nilsson *Enforcing* 266.

5. Summary and Conclusion

Promoting integration means addressing fragmentation; that is a central recognition identified when discussing how the integration principle is promoting integrated permitting. Fragmentation in its diverse varieties is one of the greatest threats to both integration and integrated permitting. The principle and its interrelationship to other, the notion of integrated permitting underpinning constructs are also at the heart of understanding the integration principle. Especially the strong interrelatedness of integration and sustainable development, which became the buzz word of modern environmental governance, is remarkable.[466] Because of the almost indefinable content of sustainable development, sustainable development is often described by aspects it contains of; here the integration of environmental protection and development is a crucial factor. As part of the environmental regulatory regime *integrated permitting* has to be recognised as one aspect aiming to achieve sustainable development on the instrumental level. The thesis found that integrated permitting is especially concerned with the implementation of environmental protection on a high level through the regulation of industrial activities.[467] That is because a permitting process, on the one hand, stands to the investor's interest to develop his business, on the other hand the government seeks to implement a legal system of requirements to control the impacts of industrial activities on the environment and human's health.[468] Therefore permitting regimes are used as one tool of regulatory mechanisms to control environmental impacts and ensure development in a sustainable manner because permitting is especially concerned with the balancing of interests sustainable development also deals with. In this regard, integrated permitting has particular potential because its overarching aim is the implementation of environmental protection on a high level what is in accordance with the aims of sustainable development.[469]

The theoretical assessment of integrated permitting regimes discovered some shortcomings.[470] Regarding integration the thesis found an inherent conceptual conflict between public participation and substantive integration. That is because it has been proved that public participation tends to degrade integration.[471] This finding cannot surprise since the interested public

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[466] See chapter 2.6.1.
[467] See chapter 3.2.
[468] OECD *Guidelines* 12.
[469] OECD *Guidelines* 13.
[470] See chapter 3.2.
[471] Bohne *Quest for Integration* 503.

broadens the array of topics and initiates their discussion.[472] In contrast, integration asks for clear objectives and the establishment of priorities; that contradicts the involvement of the public. Nevertheless the thesis emphasized that public participation does not suspend integration, but rather offers the involvement of the public an additional point of scrutiny and enhances sustainable decisions. The thesis highlighted that participation plays especially an important role in the environmental impact assessment. The findings of the assessment put the government in the situation to make comprehensive decisions about the capability to authorize activities and installations because it contains the detailed study of the expected environmental impacts. The procedure offers many possibilities for an integrated approach since it precedes the permitting. Therefore it can later serve as basis for integrated permitting. But an investigation about the assessment of cross-media impacts in the context of environmental impact assessment in the member states of the European Union has shown that the governmental decision-making based on the impact assessments barely makes any references to interconnected effects; usually also substantive integration does not take place.[473] The thesis found that as a lost opportunity because the procedure clearly offers possibilities for an integrated approach. Furthermore, it is expected that environmental and equality aspects might be subordinated to economic points due to the integrated impact assessments.[474] This has to be avoided to ensure the equal weighting of all impacts which are assessed. It became clear that the environmental impact assessment offers an opportunity for both integration and integrated permitting, at the same time certain aspects challenge the integration process. Then again the assessment of the practical application of the instrument in the Netherlands has shown that the Dutch legislator remarkable well-developed it and put a high effort into the integration of the EIA into the normal permitting regime. The success of the Dutch EIA regime confirms that it follows the right approach; a large percentage of the performed assessments bring direct benefit to the environmental friendliness of the project.[475]

How to promote integration regarding environmental governance has to be seen critically. Indeed codification provides – at least in theory - the highest degree of harmonization.[476] Nevertheless the thesis found that the actual value of a codification depends on the legal situation before implementing the holistic environmental framework. Given a perfectly integrated system existed earlier and was based on different laws, it is doubtful and cannot be simply assumed that

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[472] Bohne *Quest for Integration* 503.
[473] Bohne *Quest for Integration* 494.
[474] UNEP *EIA and SEA* 114.
[475] Heuvelhof & Nauta *Project Appraisal* 1997 25 say that 79% of all examined EIA in the Netherlands have high positive impacts.
[476] Faure 2000 *Eur Envtl L Rev* 176.

the formal act of adopting a universal codification brings about an improvement regarding the degree of harmonization. Depending on the system it is possible that the new codification only restates the former frameworks.[477] The thesis emphasised that, in case the legislator does not fully harmonize procedures and systems, *coordination* becomes important. In that case, coordination presents a compromise between total harmonization and fragmented, uncoordinated legislation.[478] Regarding the connection between integrated permitting schemes and coordination it became apparent; the less integrated the processes and institutions are the more cross-consultation is needed to achieve comprehensive and integrated permits. Otherwise overlapping and fragmented decisions might occur when the state organs set contradicting requirements regarding behaviour or installation.[479] This also means that the efficiency of internal integration is not only to be measured with a view at the institutional structure but also by recognizing the level of co-operation and coordination the state departments have implemented.[480] Cooperation and coordination become important to implement and to enhance coherent and consistent decisions especially if different departments are responsible. Finally the thesis found that the system can be highly integrated even without full integration of the framework if coordination and cooperation is procedural and institutional assured.

The assessment of the Netherlands' integrated permitting regime led to some general lessons; they might serve as a good example for countries and other systems, such as the European Union. Against the background of the common recognition that permitting separately organised by the different types of pollution and by "media-division" does not represent the most rationale approach, it was found, that many jurisdictions seek to implement integrated permitting schemes in their systems.[481] A brief view at the development has shown that the implementation of integrated permitting schemes in many jurisdictions is far from finished; mostly are procedures only coordinated instead of integrated.[482] Thus, the Netherlands' attempt of integration of environmental permitting regimes is singular in the European Union. No other country has reached such a high degree of integration. Since the authorization under the new integrated Licensing Act, Wabo, integrates around twenty-five different permits and leads to institutional and procedural integration, the Dutch system generates highly integrated environmental permits. As one key positive in the

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[477] In contrast, Rehbinder points to the ecological value of a codification regarding compliance and as an expression of the political will*, 1995 International Conference in Ghent* 159.
[478] Faure 2000 *Eur Envtl L Rev* 176.
[479] OECD *Guidelines* 51.
[480] EEA *Technical report* No 2/2005 19.
[481] See chapter 3.1.
[482] See chapter 3.1.

Dutch system, the recognition of the expertise of formerly responsible authorities has to be highlighted; they are obligatory involved through legal cooperation. Indeed the environmental administration has been fully integrated and the one-stop environmental authorization shop was implemented, but also the Dutch system was found to be fragmented. It still relies on fragmented environmental law because certain sectoral law persists. Permits regarding these media are either regulated in the authorization of the new Licencing Act, Wabo, or latched on it. But only a few laws still require a special authorization under their sectoral law. This weakness regarding the level of integration does not automatically limit the efficiency of the system; in contrast the Dutch environmental permitting regime appears to be very successful. That confirms the finding of this thesis that the institutional structure, the co-operation and the coordination of the state departments have to be recognized in order to judge the system.

Also in order to serve as guidelines how to implement integrated permitting, the thesis elaborated short-, medium- and long-term strategies to address fragmented environmental governance.[483] The Dutch environmental permitting scheme presents an exemplary framework for integrating a regime by progressive stages. Notwithstanding the Netherlands preceded the integration of its permitting scheme from already highly streamlined environmental governance. EMA, the predecessor law, already promoted both internal and external integration; inter-ministerial cooperation was considered to be very helpful to avoid fragmented and inconsistent environmental permitting. From that basis the introduction of Wabo presents only one step further to procedural and institutional integration with the implementation of a one-stop authorization shop. The thesis elaborated the development from formal to procedural integration, accompanied by substantive integration. But today the government is planning the next step of integration; therefore a holistic environmental framework is possible. It is furthermore remarkable and might become a lesson for other jurisdictions, that the country especially shows a way to integrate permitting in a decentralised system by mandating the municipalities to issue environmental permits. It shows that integration is by no means identical to centralisation. Additionally, the Netherlands are generally following a deregulation movement and have limited the scope of its environmental permitting scheme. The option to reduce permitting in favour of other regulatory and non-regulatory instruments should also be an option to be considered for other legal systems; it offers a possibility to disburden both the state and private actors.

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[483] See chapter 3.3.

Finally, the thesis positively considered that the Dutch legal system is traditionally open to foreign law systems and, of course, European Law. The tradition of the country to be open for transformation and to improve the legal order,[484] should serve as an example for other jurisdictions. The Netherlands have constantly legally responded to environmental problems and international developments. Continuing down this path the Dutch system is taking a leading role in integrating permitting. Thus it is worth to observe the development in future because it will continue providing a guiding example how to practically promote integrated permitting.

[484] Nilsson *Enforcing Environmental Responsibilities* 253.

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